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No. 87-2027

In The
Supreme Court of the United States
October Term, 1987

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodard,

Petitioner,

vs.

WESTERN PAVING CONSTRUCTION CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In order to equitably toll federal statutes of limitation pursuant to the doctrine of fraudulent concealment, is it sufficient that defendants have either engaged in wrongdoing which is "inherently self-concealing" or committed affirmative concealing conduct *in the course of* perpetrating the offense, or must they engage in affirmative acts of concealment *in addition to* the substantive violation itself?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
STATEMENT OF DISTRICT COURT'S JURISDICTION	11
REASON FOR ALOWANCE OF THE WRIT	
I. THE INSTANT CASE PRESENTS THE ISSUE OF EQUITABLE TOLLING OF THE ANTITRUST STATUTE OF LIMITATIONS DUE TO FRAUDULENT CONCEALMENT, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT PREVIOUSLY BEEN DECIDED BY THE SUPREME COURT.	11
A. The Antitrust Laws Are Of Exceptional Public Import And Should Not Be Subjected To A Singularly Expansive Reading Of The Statute Of Limitations Which Has The Effect Of Limiting Their Application Or Relegating Them To A Position Inferior To That Of Laws Pertaining To Fraud.	13
B. It Would Be Antithetical To The Broad Remedial Effect Intended For The Antitrust Laws, And The Notion Of Equity Which Underlies The Fraudulent Concealment Doctrine, To Reward The Most Successful Antitrust Violators By Protecting Them From Suit	15

TABLE OF CONTENTS—Continued

Page

C. The Absence Of Supreme Court Direction Regarding Application Of The Fraudulent Concealment Doctrine In The Antitrust Context Is Particularly Problematic In The Case Of *Per Se* Violations Such As Bidrigging And Price Fixing. 17

II. THE LOWER FEDERAL COURTS ARE DIVIDED IN THEIR EFFORTS TO INTERPRET AND APPLY THE DOCTRINE OF FRAUDULENT CONCEALMENT TO FEDERAL STATUTES OF LIMITATION. 18

A. The Tenth Circuit Is Internally Divided And The Decisions Of Other Federal Courts Of Appeal Are In Direct Conflict. 18

B. The District Of Colorado Is Internally Divided And The Decisions Of Other Federal District Courts Are In Direct Conflict. 22

C. The Policy Rationale Behind The Fraudulent Concealment Doctrine Mandates One Uniform Approach. 24

III. THE DECISION IN THE CASE AT HAND APPEARS DIRECTLY TO CONTRAVENE PRIOR SUPREME COURT PRECEDENT. 26

A. The Instant Case, Involving The *Per Se* Antitrust Violation of Bidrigging, Is Not Distinguishable From Prior Supreme Court Decisions. 26

B. "Passive" As Well As "Active" Concealment Serves To Toll The Running Of The Statute Of Limitations. 27

C. There Is No Requirement That Concealing Conduct Be Separate From The Underlying Violation. 28

TABLE OF CONTENTS—Continued

Page

D. The Fraudulent Concealment Doctrine Is To Be Read Into, Not Out Of, Federal Statutes Of Limitation. 28

CONCLUSION 29

APPENDIX

En banc decision (*per curiam*) of the United States Court of Appeals for the Tenth Circuit ..... App. 1-2

Order describing issues to be considered for *en banc* rehearing ..... App. 2-3

Order granting petitions for rehearing and accepting *en banc* rehearing ..... App. 3-4

Panel Opinion of the United States Court of Appeals for the Tenth Circuit ..... App. 5-42

Opinion and Judgment of the United States District Court for the District of Colorado ..... App. 43-56

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Liberty Lobby, Inc., — U.S. —, 106 S.Ct. 2505 (1986) 8

Ashland Oil Co. v. Union Oil Co. of California, 567 F.2d 984 (T.E.C.A. 1977), cert. denied, 435 U.S. 994 (1978) 20

Associated Electric Cooperative v. Sachs Electric Co., 1987-1 Trade Cas. (CCH) para. 67,567 (W.D. Mo. 1987) 19, 24

Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875) 11, 12, 15 20, 26, 27, 28

Baker v. F & F Investment, 420 F.2d 1191 (7th Cir. 1970) 20

Berkson v. Del Monte Corp., 743 F.2d 53 (1st Cir. 1984), cert. denied, 470 U.S. 1056 (1985) 20

Bethlehem Steel Corp. v. Fischbach & Moore, Inc., 641 F.Supp. 271 (E.D. Pa. 1986) 18, 24, 25, 26

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 16

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 14

Colorado ex rel. Woodard v. Asphalt Paving Co., 1987-1 Trade Cas. (CCH) para. 67,473 (D. Colo. 1987) 23, 25, 26

Colorado ex rel. Woodard v. Corn Construction Co., 1984-1 Trade Cas. (CCH) para. 65,812 (D. Colo. Jan. 10, 1984) 3

Colorado ex rel. Woodard v. Goodell Bros., Inc., 1986-2 Trade Cas. (CCH) para. 67,236 (D. Colo. 1986) 23

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 14

TABLE OF AUTHORITIES—Continued

Page

Exploration Co. v. United States, 247 U.S. 435 (1918) 27, 28

F. Buddie Contracting, Inc. v. Seawright, 595 F. Supp. 422 (N.D. Ohio 1984) 24, 25

Gaetzi v. Carling Brewing Co., 205 F.Supp. 615 (E.D. Mich. 1962) 19

Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959) 16

Greenhaw v. Lubbock County Beverage Association, 721 F.2d 1019 (5th Cir. 1983) 17, 24

Gulf State Utilities Co. v. FPC, 411 U.S. 747 (1973) 14

Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985) 19, 20, 21, 24

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 12, 15, 16, 26, 27, 28, 29

In re Fertilizer Antitrust Litigation, 1979-2 Trade Cases (CCH) para. 62,894 (E.D. Wash. 1979) 24

Ingram Corp. v. J. Ray McDermitt & Co., 698 F.2d 1295 (5th Cir. 1983) 25

Kansas City v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir.), cert. denied, 371 U.S. 912 (1962) 17

King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147 (10th Cir. 1981), cert. denied, 454 U.S. 1146 (1982) 6, 7, 8, 20

Long v. Abbott Mortgage Corp., 459 F.Supp. 108 (D. Conn. 1978) 19, 25

TABLE OF AUTHORITIES—Continued

Page

Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976) 20

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 15

Nebraska v. Land Paving Co., 1986-1 Trade Cas. (CCH) para. 67,106 (D.Neb. 1985) 25

New York v. Hendrickson Brothers, Inc., 840 F.2d 1065 (2nd Cir. 1988) 17, 18, 20, 21

Northern Pacific Railway v. United States, 356 U.S. 1 (1958) 14

Pennsylvania v. Lake Asphalt & Petroleum Co., 610 F.Supp. 885 (M.D. Pa. 1985) 23

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 16

Pinney Dock & Transport Co. v. Penn Central Corp., 838 F.2d 1445 (6th Cir. 1988) 20, 24

Rosenthal v. Walker, 111 U.S. 185 (1884) 27, 28

Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248 (9th Cir. 1978) 20

Semke v. Enid Automobile Dealers Association, 456 F.2d 1361 (10th Cir.), cert. denied, 409 U.S. 869 (1972) 16

Standard Oil Co. v. FTC, 340 U.S. 231 (1951) 13

United States v. A-A-A Elec. Co., 788 F.2d 242 (4th Cir. 1986) 23

United States v. Corn Construction Co., [1980-88 Transfer Binder] Trade Reg. Rep. (CCH) para. 45,083 (Case Nos. 3091, 3092) (D. Colo. June 14, 1983) 2

United States v. Evans & Assocs. Constr. Co., 839 F.2d 656 (10th Cir. 1988) 23

TABLE OF AUTHORITIES—Continued

Page

United States v. Girard, 744 F.2d 1170 (5th Cir. 1984) 23

United States v. Inryco, 642 F.2d 290 (9th Cir. 1981) 23

United States v. Northern Improvement Co., 814 F.2d 540 (8th Cir. 1987), cert. denied,— U.S. —, 108 S.Ct. 141 (1987) 23

United States v. Topco Associates, 405 U.S. 596 (1972) 14

United States v. Washita Construction Co., 789 F.2d 809 (10th Cir. 1986) 15, 27

STATUTORY AUTHORITY

Sherman Antitrust Act, Section 1, 15 U.S.C. sec. 1, as amended (1982) 1, 2, 11, 21, 27

Clayton Antitrust Act, Section 4, 15 U.S.C. sec. 15, as amended (1982) 1, 3, 11

Clayton Antitrust Act, Section 4B, 15 U.S.C. sec. 15b, as amended (1982) 1, 4, 11, 15

18 U.S.C. sec. 3282 (1982) 2

28 U.S.C. sec. 1254(1) (1982) 1

28 U.S.C. secs. 1331 and 1337 (1982) 11

Federal Rule Civil Procedure 11 4

OTHER AUTHORITY

II P. Areeda and D. Turner, Antitrust Law sec. 325 at 124 (1978) 25

Marcus, Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?, 71 Geo. L. J., 829, 833-36 (1983) 30

OPINIONS BELOW

1. *En banc* decision (*per curiam*) of the United States Court of Appeals for the Tenth Circuit, 841 F.2d 1025 (10th Cir. 1988) (vacating prior judgment, withdrawing panel opinion and affirming, by equally divided Court, judgment of District Court). App. 1-2.

2. Panel opinion of the United States Court of Appeals for the Tenth Circuit, 833 F.2d 867 (10th Cir. 1987) (vacated and withdrawn). App. 5-42.

3. Opinion of the United States District Court for the District of Colorado, 630 F.Supp. 206 (D. Colo. 1986) (affirmed). App. 43-55.

JURISDICTION

The *per curiam* decision of the United States Court of Appeals for the Tenth Circuit was entered on March 10, 1988, following an *en banc* rehearing on March 3, 1988. The rehearing was held pursuant to orders of the Tenth Circuit dated December 31, 1987, and January 29, 1988. The instant petition for writ of certiorari is filed within ninety days of the *en banc* Tenth Circuit's issuance of its *per curiam* decision. This Court has certiorari jurisdiction pursuant to 28 U.S.C. sec. 1254(1) (1982).

STATUTES INVOLVED

Sherman Antitrust Act, Section 1, 15 U.S.C. sec. 1, as amended (1982)

Clayton Antitrust Act, Sections 4, 4B, 15 U.S.C. secs. 15, 15b, as amended (1982)

STATEMENT OF THE CASE

This antitrust treble damage action involves alleged participation by respondent Western Paving Construction Co. ("Western Paving" or "Western") in a continuing conspiracy to rig bids in violation of Section 1 of the Sherman Act, 15 U.S.C. sec. 1, as amended (1982). At issue are three road construction projects let by the Colorado Department of Highways ("CDOH") in the 1970's.[1] Because the suit of petitioner State of Colorado (the "State") was not filed for almost ten years after the most recent of the three jobs was let, the tolling of the federal antitrust statute of limitations is critical to this case.

The State obtained at least constructive knowledge of Western Paving's potential involvement in highway bidrigging on July 27, 1983, when federal prosecutors filed a pleading in *United States v. Corn Construction Co.*, [1980-88 Transfer Binder] Trade Reg. Rep. (CCH) para. 45,083 (Case Nos. 3091, 3092) (D. Colo. June 14, 1983), a criminal bidrigging action.[2] That document, entitled "Government's List of Prior Similar Acts of Defendants," identified a number of highway construction projects let by CDOH from 1969-78 as having been either rigged or at least the subject of bidrigging discussions. It listed re-

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[1]The Colorado Department of Highways ("CDOH") road construction projects at issue in this action are as follows: the 1971 Newcastle Easterly job, No. 170-1(32)105, let January 7, 1971; the 1973 Lamar-East project, No. C17-0050-02, let March 15, 1973; and the 1974 Parker Road job, No. C47-0083-09, let August 29, 1974.

[2]Respondent Western Paving was not among the defendants indicted for conspiring to rig bids on Colorado highway construction projects within the 5-year criminal statute of limitations prescribed in 18 U.S.C. sec. 3282 (1982).

spondent Western Paving as a bidder on two of the projects.[3]

Subsequent to the completion of the criminal antitrust litigation in *Corn Construction Co.*, the State filed a civil antitrust case against Corn in federal court, along with a consent settlement. *Colorado ex rel. Woodard v. Corn Construction Co.*, 1984-1 Trade Cas. (CCH) para. 65,812 (D. Colo. Jan. 10, 1984). Pursuant to that settlement, during the first half of 1984 defendants in the *Corn* action cooperated with the State by making disclosures regarding bidrigging on CDOH projects.[4] Included in the information provided by the *Corn* defendants was evidence implicating Western Paving in bidrigging on a highway construction project let by CDOH.

Based on the foregoing and other information, the State filed its complaint in the instant action on July 19, 1984, seeking treble damages. *See* Clayton Act Section 4, 15 U.S.C. sec. 15, as amended (1982). The suit alleged Western Paving's involvement in a continuing conspiracy to rig bids on CDOH projects in the time period 1971-78.[5]

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[3]The two "prior similars" on which Western Paving was a bidder were the 1971 Newcastle Easterly project, *see supra* n. 1, and the 1978 Interstate 85 West, Douglas County, project, No. MP-47-0067-06.

[4]In addition to cooperating with the State, the defendants in the *Corn* civil action paid $250,000 in resolution of the State's claims in the litigation, accepted imposition of a permanent injunction, and were subject to certain compliance and reporting requirements for a period of four years.

[5]In line with the prosecution's "prior similars" list in the *Corn* criminal case, and based on additional separate pre-filing investigation by the State, the 1978 Interstate 85 West, Douglas County, job, *see supra* n. 3, initially was alleged to have been rigged. However, post-filing discovery failed to substantiate

(Continued on following page)

The complaint also alleged that Western Paving and its co-conspirators fraudulently concealed the conspiracy, thereby equitably tolling the four-year federal antitrust statute of limitations. *See* Clayton Act Section 4B, 15 U.S.C. sec. 15b, as amended (1982).

Following a period of discovery, the parties filed cross-motions in the trial court seeking summary judgment. Western Paving sought dismissal of the State's suit as time-barred, on the ground that the doctrine of fraudulent concealment was inapplicable. The sole contention advanced by Western in this regard[6] was that the "fraudulent means" prong of the fraudulent concealment doctrine necessitates a showing of "affirmative acts" of concealment, which requirement the State could not meet.[7]

The State, on the other hand, sought a ruling that fraudulent concealment was conclusively established. The State urged that it need not show affirmative acts of concealment at all, because the conspiracy alleged was "inherently self-concealing" in nature. Nevertheless, if af-

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that belief. Accordingly, the State ultimately dropped the project from the litigation. Meanwhile, two other projects, the 1973 Lamar-East and the 1974 Parker Road jobs, *see supra* n. 1, were discovered to have been rigged and were added to the litigation.

[6]Western Paving also sought dismissal of the State's suit on the basis that it had been filed in violation of Fed. R. Civ. P. 11. The District Court rejected this contention. *See* App. 53-54. The initial opinion, by the Tenth Circuit panel, affirmed the lower court on this point. App. 38-39. Western Paving did not seek rehearing on the Rule 11 issue.

[7]Western Paving did not argue that the State failed to meet either the "concealment/non-discovery" or "due diligence" prongs of the fraudulent concealment test. Specifically, Western has never asserted that the State discovered its claim more than four years prior to the filing of suit or that the State was in any way negligent in not discovering its claim and filing suit sooner than it did.

firmative acts were necessary, the State asserted that it had established them in the case at hand.

The District Court resolved the parties' cross-motions by granting summary judgment for Western Paving and denying it to the State. The lower court utilized a multi-step analysis in arriving at its decision.

Initially, the trial court reasoned that there is a "more stringent" test for applying the fraudulent concealment doctrine to toll the statute of limitations in antitrust actions than in fraud cases. App. 46. Thus, the court specifically rejected the concept that an "inherently self-concealing" wrong may suffice to toll the antitrust statute of limitations under the fraudulent concealment doctrine. *See* App. 48-49 & n. 3.

Instead, the trial court ruled that "affirmative acts of concealment" are necessary to toll the statute in antitrust cases. It reasoned that such acts may not be those "taken in carrying out the conspiracy itself"; rather, they must be "*affirmative* steps *in addition to* the original wrongdoing to prevent the plaintiff from discovering the wrong." App. 51-52 (emphasis added). The District Court concluded that, for two reasons, the acts relied upon by the State are not *affirmative* acts of *concealment.* First, the lower court characterized certain of the acts as either mere failures to disclose or denials of wrongdoing—essentially as being passive rather than affirmative. Second, the trial court categorized other of the acts in question as having been taken in the course of perpetrating the wrong rather than having been undertaken in addition to it. *See* App. 49-52.

On appeal by the State, a panel of The United States Court of Appeals for the Tenth Circuit reversed the Dis-

trict Court's grant of summary judgment in favor of Western Paving. The Tenth Circuit panel then directed that the case be remanded for trial.

Initially, the panel majority[8] agreed with the lower court's contention that, in order to qualify as "affirmative acts of concealment," *affirmative* conduct *in addition to* the original wrong must be undertaken to prevent the plaintiff from discovering the violation. The majority reasoned that even though acts which are *part of* the original wrong may serve to conceal it, they are acts of perpetration rather than acts of concealment. Consequently, the panel majority agreed with the trial court that all the acts relied on by the State either were mere denials or silence and so were not affirmative, or they were acts taken in carrying out the violation itself and so did not constitute concealment. Thus, the majority concluded that the State had shown no *affirmative* acts of *concealment*. *See* App. 26-28.

Notwithstanding the preceding, the panel majority diverged from the District Court by ruling that an "inherently self-concealing" wrong could suffice in place of affirmative acts of concealment to toll the statute of limita-

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[8]Judge Anderson filed a separate opinion concurring in the result, which he viewed as being compelled by the Tenth Circuit's prior decision in *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982). Judge Anderson differed from the panel majority in that he did not favor adoption of the "self-concealing wrong" theory as a means of tolling the statute of limitations. Instead, he favored requiring affirmative acts of concealment but allowing them to be part of the substantive violation. In his view, the justification for tolling the statute—protecting innocent plaintiffs and not rewarding wrongdoing defendants—is equally applicable no matter when the concealing conduct occurs. App. 39-40. (Judge Anderson then concluded his concurrence by explicating his concern that the panel's decision moved the law closer to a pure "discovery" rule relative to tolling the statute of limitations.)

tions. *See* App. 33. The majority went further and held that bidrigging is a *per se,* or inherently, self-concealing wrong. *See* App. 36-37.

However, the panel majority was concerned that allowing tolling of the statute of limitations on a "self-concealing wrong" theory could exacerbate the very "stale evidence" problem which the statute was designed to prevent. App. 31. Accordingly, the panel adopted a higher standard of proof—"clear and convincing" evidence, rather than the ordinary "preponderance"—for plaintiffs seeking to proceed on such theory. *See* App. 32-33. Furthermore, the panel majority noted that in the case of a self-concealing wrong the evidence necessary to establish tolling is essentially the same as that needed to establish liability. Consequently, the panel extended the heightened evidentiary standard beyond proof of tolling to proof of liability as well. App. 33-34.

Both parties then filed petitions for rehearing, with suggestions for rehearing *en banc.* The State sought such rehearing based on the unprecedented evidentiary standard promulgated by the panel for both tolling and liability. Western Paving sought rehearing as to the sufficiency of an "inherently self-concealing" wrong to toll the statute of limitations.

The Tenth Circuit granted rehearing *en banc.* The issues specified by the appellate court for supplemental briefing and oral argument on rehearing were: (i) the correct interpretation and application of the fraudulent concealment tolling doctrine, including "affirmative acts of concealment" and "inherently self-concealing" wrongs; (ii) whether and the extent to which the Tenth Circuit's prior *King* decision constituted applicable or controlling

precedent,[9] and if so, whether it should be followed, modified or overruled; and (iii) the "clear and convincing" evidentiary standard. App. 2-4.

Following oral argument, the Tenth Circuit was evenly divided. Therefore, the prior judgment of the appellate court was vacated, the opinion of the panel was withdrawn, and the judgment of the District Court was reinstated and affirmed. App. 1-2.

In view of the preceding, the State now brings the case before this Court pursuant to the instant petition for writ of certiorari. The relevant facts of record in support of this petition[10] are as follows:

1. *Continuing bidrigging conspiracy.* Western Paving and other contractors participated in a continuing conspiracy to rig bids which encompassed three highway construction projects let by CDOH in 1971 (the Newcastle Easterly project), 1973 (the Lamar-East project) and 1974 (the Parker Road project). In order to endure over time, the conspiracy had to be and was concealed.

2. *Complementary bids/illusion of competition.* To hide the lack of true competition on each of the three jobs in question, the conspirators, including Western, agreed to and did submit sham or "complementary" bids higher than that of the predetermined winner. This scheme was designed to create the appearance of competition when in fact there was none.

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[9]*See King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d at 1154-56.

[10]As the party which opposed Western Paving's summary judgment motion in the trial court, the State's evidence is to be believed and all inferences are to be drawn in the light most favorable to the State. *See Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S. Ct. 2505, 2513 (1986).

To further enhance the illusion of competition on the 1971 Newcastle Easterly project, two co-conspirators specifically agreed to and did submit complementary bids deceptively close to the predetermined winning bid of Corn Construction Co. In turn, Larry Corn of Corn Construction Co. prepared his bid in such an amount that, although artificially inflated, it nonetheless appeared competitive in relation to the CDOH estimate.

3. *False non-collusion affidavit.* In connection with the 1971 Newcastle project, Larry Corn intentionally submitted to CDOH a false and fraudulent affidavit of non-collusion. He falsely swore in writing under oath that he was unaware of any collusive bidding for the job when in fact he had rigged the bidding on the project with Western Paving and other contractors who submitted complementary bids.

4. *Undercover contacts.* In connection with the 1971 Newcastle project, co-conspirator Corn intentionally placed bidrigging telephone calls to Western Paving and other conspirators from the total privacy of a motel room, away from his office, where the conversations could not be overheard. He also contacted one conspirator in person, away from business offices.

5. *"Talk list"/document destruction.* Also in conjunction with the 1971 project, Corn made a written list containing the names and phone numbers of likely bidders, including Western and other conspirators. He used the list for assistance in making bidrigging telephone calls from the motel room. After making the calls, he destroyed the list with the specific intention of concealing the conspiracy's existence.

6. *Falsified invoice/secret payoff.* In connection with the rigging of bids on the 1974 Parker Road job (on

which Western Paving was a bidder), co-conspirator Fred Settle of Peter Kiewit Sons Co. ("Kiewit") agreed to pay $10,000 to another co-conspirator, Donald Popejoy of Popejoy Construction Co., for submitting a complementary bid in favor of Kiewit. To conceal the existence of the conspiracy, Popejoy fabricated a false invoice for equipment rental, in an uneven amount (*i.e.*, not exactly $10,000), and sent it to Settle. Settle paid the false invoice, thereby effectuating the payoff while keeping the conspiracy secret.

7. *Secrecy* (Corn). The need for secrecy was patently obvious and a matter of implicit understanding among the bidrigging conspirators, including Western Paving; the success of the conspiracy depended upon its not being discovered. For 12 years co-conspirator Corn kept the conspiracy secret and concealed it from all non-participants. He concealed it even from employees within his own company. Corn first disclosed the conspiracy to an outsider (a federal criminal prosecutor) in 1983, approximately 1 year before the filing of the present suit.

8. *Secrecy* (Western). Western Paving's former president, Harold Stillman,[11] participated with Corn and other conspirators in rigging bids on the 1971 Newcastle project. Stillman also kept the conspiracy secret and concealed it from non-participants, so much so that other officers of Western never discovered it or Stillman's participation in it on behalf of Western. Likewise, Alvin Walters of Western Paving kept the conspiracy and his in-

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[11]Mr. Stillman died within five months after involving Western Paving in bidrigging on the 1971 Newcastle project. Significantly, then, even if suit had been filed within the four year statutory limitations period following the 1971 Newcastle project, Mr. Stillman nonetheless would have been unavailable as a witness for either the State or Western.

volvement in it secret and concealed from non-participants, including other officers and personnel of Western.

9. *Secrecy* (Popejoy). As did Corn, Stillman and Walters, Donald Popejoy of Popejoy Construction Co. kept the conspiracy and his involvement in it secret from non-participants. He did not disclose his anticompetitive actions to the State until 1985, twelve years after he rigged the Lamar-East project with various co-conspirators, including Western.

10. *Routine document destruction.* Prior to the filing of suit, the State and Western Paving had each routinely destroyed some but not all documents potentially relevant to the bidrigging conspiracy alleged in the complaint.

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STATEMENT OF DISTRICT COURT'S JURISDICTION

The District Court had federal question jurisdiction of this matter pursuant to 28 U.S.C. secs. 1331 and 1337 (1982), and Sections 1 of the Sherman Act and 4 and 4B of the Clayton Act, 15 U.S.C. secs. 1, 15 and 15b, as amended (1982).

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REASONS FOR ALLOWANCE OF THE WRIT

I. THE INSTANT CASE PRESENTS THE ISSUE OF EQUITABLE TOLLING OF THE ANTITRUST STATUTE OF LIMITATIONS DUE TO FRAUDULENT CONCEALMENT, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT PREVIOUSLY BEEN DECIDED BY THE SUPREME COURT.

In *Bailey v. Glover,* 88 U.S. (21 Wall.) 342 (1875), this Court first enunciated the three-pronged test for fraudulent concealment which equitably tolls federal statutes of limitation. The Court there held that such stat-

utes do not begin to run until the plaintiff discovers or learns of the wrong:

> [1] When there has been no negligence or laches on the part of the plaintiff [2] in coming to the knowledge of the fraud which is the foundation of the suit, and [3] when the fraud has been concealed, *or is of such character as to conceal itself* . . . .

88 U.S. (21 Wall.) at 349-50 (emphasis and numbering added).

Over seventy years later, in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the Supreme Court reaffirmed the applicability of the *Bailey* three-pronged fraudulent concealment exception to all federal statutes of limitation:

> [W]here a plaintiff has been injured and [1] "remains in ignorance of it without any fault or want of diligence or care on his part, [2] the bar of the statute does not begin to run until the fraud is discovered [3] *though there be no special circumstances or effort on the part of the party committing the fraud to conceal it* from the knowledge of the other party." *Bailey v. Glover*, 21 Wall. (US) 342, 348 . . . .
>
> This equitable doctrine is read into *every* federal statute of limitations.

327 U.S. at 397 (emphasis and numbering added).

From the foregoing, it would appear that there exists one, three-pronged test for equitably tolling federal statutes of limitation due to fraudulent concealment. However, the Tenth Circuit's reinstatement and affirmance of the lower court judgment here suggests otherwise.

The opinion of the District Court expressly limits to the fraud context the teaching of *Bailey* and *Holmberg* that the statute of limitations may be tolled even though there is no special effort by the wrongdoer to conceal his

violation because it is of such a nature as to conceal itself. App. 46, 48 & n. 2, 49 & n. 3. Conversely, the trial court viewed various federal courts of appeal as having established a separate, "more stringent" test for tolling the statute of limitations in antitrust cases, requiring the further showing of "affirmative acts of concealment." App. 46-47.

The District Court viewed the standard in antitrust cases as requiring proof that the defendant took affirmative steps in *addition* to the original wrongdoing in order to lead the plaintiff to believe that he did not have a claim for relief. App. 47, 51-52. The lower court reasoned that the need for such proof is obviated in the fraud context, because fraud is a continuing affirmative act of concealment which is inherently more difficult for an injured party to discover. App. 47.

The Supreme Court has never expressly addressed the fraud versus antitrust, "self-concealing" versus "affirmative acts" dichotomy posited in the District Court's ruling. Indeed, this Court has never issued an opinion explicating the fraudulent concealment doctrine in an antitrust context.

A. The Antitrust Laws Are Of Exceptional Public Import And Should Not Be Subjected To A Singularly Expansive Reading Of The Statute of Limitations Which Has The Effect Of Limiting Their Application Or Relegating Them To A Position Inferior To That Of Laws Pertaining To Fraud.

Faith in the value of competition has long been the heart of our national economic policy. *Standard Oil Co.*

v. FTC, 340 U.S. 231, 248 (1951). Indeed, competition is the fundamental principle governing commerce in this country; it is the polestar by which all are to be guided in ordering their business affairs. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398, 406 (1978).

This national "commitment" to the policy of free and open competition in the marketplace is reflected in the antitrust laws. *See Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982). As "the Magna Carta of free enterprise," the antitrust laws are fundamental to the preservation of the American competitive economic system. *United States v. Topco Associates*, 405 U.S. 596, 610 (1972). They are "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958). In short, the antitrust laws embody overarching and fundamental policies of signal public importance. *City of Lafayette*, 435 U.S. at 399, 400.

The District Court's decision here singles out the antitrust statute of limitations for uniquely broad application by giving a more narrow interpretation to the fraudulent concealment doctrine in the antitrust context than in cases relating to mere fraud. This has an obvious and unwarranted limiting effect on the application of the federal antitrust laws. Additionally, it relegates the antitrust laws to a position of inferiority to laws pertaining to fraud. In both respects, the lower court's action contravenes the "fundamental national economic policy" of competition embodied in the antitrust laws. *See Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 759 (1973).

B. It Would Be Antithetical To The Broad Remedial Effect Intended For The Antitrust Laws, And The Notion Of Equity Which Underlies The Fraudulent Concealment Doctrine, To Reward The Most Successful Antitrust Violators By Protecting Them From Suit.

As noted above, the antitrust laws serve important national purposes. Thus, it is not surprising that in enacting them Congress sought to strike as broadly as it could, exercising the full extent of its constitutional powers. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229-35 (1948).

Nevertheless, Congress also saw fit to impose a four-year statute of limitations upon antitrust civil damage actions. Clayton Act Section 4B, 15 U.S.C. sec. 15b, as amended (1982). In preventing parties from asserting rights after the lapse of time, such statutes of limitation are designed to prevent fraud. *See Bailey v. Glover*, 88 U.S. (21 Wall.) at 349.

However, the doctrine of fraudulent concealment operates as an exception to federal statutes of limitation. *Holmberg v. Armbrecht*, 327 U.S. at 397. It embodies the important equitable principle that violators of the law should not be shielded by those statutes where the protection would be obtained as a result of the offenders' concealing their violations or committing them in such a manner that they conceal themselves. *See Bailey*, 88 U.S. (21 Wall.) at 349. Otherwise statutes of limitation, which are designed to prevent fraud, would become the very means by which fraud could be effectuated.[12] *Id.* In short,

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[12]The *per se* antitrust offense of bidrigging constitutes fraud, *See United States v. Washita Construction Co.*, 789 F.2d 809, 818 (10th Cir. 1986) (bidrigging effectuated by submission of complementary bids and filing of false non-collusion affidavits held to be scheme or artifice to defraud).

the idea behind the fraudulent concealment exception to the statute of limitations is that wrongdoers should not be permitted to take advantage of their own violations.[13] *See Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959).

From the foregoing, it is apparent that the public policies reflected in the antitrust laws and the equitable underpinnings of the fraudulent concealment doctrine are entirely consistent with one another. Congress intended to give broad remedial effect to the federal antitrust laws. *See, e.g., Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312-13 (1978). Congress particularly sought to encourage the vigorous enforcement of those laws by providing a civil treble damage remedy as an incentive for injured persons to bring suit. *Semke v. Enid Automobile Dealers Association*, 456 F.2d 1361, 1370 (10th Cir.), *cert. denied*, 409 U.S. 869 (1972). *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977). An expansive interpretation of the equitable doctrine of fraudulent concealment in the antitrust context, resulting in a narrow reading of the antitrust statute of limitations pertaining to such treble damage actions, facilitates this Congressional purpose.

Conversely, a restrictive interpretation of the fraudulent concealment doctrine, leading to a broad construction of the antitrust statute of limitations, would frustrate Con-

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[13]It would simply be unfair to bar the suit of an injured plaintiff due to the mere lapse of time in situations where it was the wrongdoer's own conduct which prevented the plaintiff from timely bringing suit in the first place. Thus, for reasons of equity the doctrine of fraudulent concealment precludes a statute of limitations defense in such situations. *See Holmberg v. Armbrecht*, 327 U.S. at 396-97.

gress' intent. As cogently stated by the Eighth Circuit in a case involving bidrigging and price-fixing:

> We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized.

Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962). Yet, that is exactly the effect of the decision of the District Court in the case at hand.

C. The Absence Of Supreme Court Direction Regarding Application Of The Fraudulent Concealment Doctrine In the Antitrust Context Is Particularly Problematic In The Case Of Per Se Violations Such As Bidrigging And Price Fixing.

The *per se* offenses of bidrigging and price fixing virtually always involve agreements which are kept secret and meetings which are held in covert fashion, both of necessity in order to effectuate the violation and because of the criminal penalties and civil remedies which might result if such actions are discovered. *See, e.g., New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065, 1084 (2d Cir. 1988) (quoting *Colorado ex rel. Woodard v. Western Paving Construction Co.*, 833 F.2d 867, 881 (10th Cir. 1987)) (bidrigging); *Greenhaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1030 (5th Cir. 1983) (price fixing). Moreover, bidrigging conspiracies in particular tend to exist for an extended period of time in

order that all conspirators may be rewarded for their participation. For such continuing conspiracies to be successful, they must be concealed. *See Hendrickson,* 840 F.2d at 1084 (quoting *Western Paving,* 833 F.2d at 881).

Thus, as a practical matter, there is simply no need for *per se* antitrust violators such as bidriggers and price fixers to take any *additional* steps whatever to cover up their already-hidden wrongdoing. A rule that would require them to do so before tolling the statute of limitations against them essentially would mean that the statute would never be tolled in such cases. *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.,* 641 F.Supp. 271, 274 (E.D.Pa. 1986). As a result there would then exist a virtually absolute statute of limitations protecting the most heinous of all antitrust violators at the expense of their innocent victims. Such an approach would directly contravene the important public policies embodied in the antitrust laws and would be violative of traditional notions of fundamental fairness as well. Yet, that is precisely the effect of the District Court's decision in the instant case.

II. THE LOWER FEDERAL COURTS ARE DIVIDED IN THEIR EFFORTS TO INTERPRET AND APPLY THE DOCTRINE OF FRAUDULENT CONCEALMENT TO FEDERAL STATUTES OF LIMITATION.

A. The Tenth Circuit Is Internally Divided And The Decisions Of Other Federal Courts Of Appeal Are In Direct Conflict.

The actions of the Tenth Circuit in this case constitute a paradigm for the conflict and confusion afflicting the federal appellate courts in attempting to deal with the fraudulent concealment doctrine. The Tenth Circuit panel was divided two to one in adopting a definition for "affirmative acts of concealment" sufficient to toll the stat-

ute of limitations under the fraudulent concealment exception. The panel majority viewed such acts as being limited only to steps taken *in addition to* the original wrongdoing and as *not* including acts undertaken in *perpetration* of the offense itself, even though the latter may in fact have the effect of concealing the violation. *Compare* App. 27-28 (panel majority) *with* App. 39-40 (Anderson, J., concurring). Conversely, the panel was split two to one in recognizing that "inherently self-concealing" wrongs are also sufficient to toll the statute of limitations. *Compare* App. 33 (panel majority) *with* App. 39 (Anderson, J., concurring). On *en banc* rehearing, the entire Tenth Circuit was divided four to four. App. 1-2.

Similarly, there is a split among the circuits, in particular concerning whether an "inherently self-concealing" wrong[14] suffices to toll federal statutes of limitation under the fraudulent concealment doctrine in the absence of affirmative acts of concealment. *See Associated Electric Cooperative v. Sachs Electric Co.*, 1987-1 Trade Cas. (CCH) para. 67,567 at p. 60,398 (W.D. Mo. 1987).

One line of circuit court decisions includes a 1988 Sixth Circuit antitrust ruling. Those cases hold that the test for equitably tolling the statute of limitations pursuant to the doctrine of fraudulent concealment requires

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[14]An "inherently self-concealing" wrong has been viewed as one where the offender does only what is necessary to perpetrate the violation, without undertaking any additional efforts at concealment, and those actions alone render the wrong unknowable. In other words, by their very nature the activities in furtherance of the commission of the offense prevent discovery. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 34-35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Long v. Abbott Mortgage Corp.*, 459 F. Supp. 108, 120 (D. Conn. 1978); *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615, 623 (E.D. Mich. 1962).

the wrongdoer to engage in affirmative acts of concealment; commission of an "inherently self-concealing" violation does not suffice. *See Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988). *Accord, e.g., Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978). *See also Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 597 (4th Cir. 1976).

However, another directly conflicting line of federal appellate decisions, including a 1988 Second Circuit antitrust ruling, holds exactly the contrary. Under that line of cases, fraudulent concealment sufficient to toll the statute of limitations may also be established by an "inherently self-concealing" wrong, as indicated in *Bailey v. Glover*. *New York v. Hendrickson Brothers, Inc.*, 840 F.2d at 1083. *Accord, e.g., Hobson v. Wilson*, 737 F.2d 1, 33-35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (T.E.C.A. 1977), *cert. denied*, 435 U.S. 994 (1978); *Baker v. F & F Investment*, 420 F.2d 1191, 1199 (7th Cir. 1970) ("[w]here, *as in the case of many conspiracies in violation of the federal antitrust laws, the wrong is self-concealing*, little need be added in order to justify tolling the statute.").

The conceptual difference between the two disparate approaches is quite simple. To toll the statute of limitations in those circuits following the "affirmative acts" test, the concealing conduct must be separate and apart

from the underlying wrong and intended only to cover it up. To toll the statute in those circuits which additionally recognize the "inherent self-concealment" approach, the concealing conduct may be part and parcel of the commission of the violation itself. *See, e.g., Hobson v. Wilson,* 737 F.2d at 33 n. 102 (endorsing a "self-concealing" interpretation).

However, the difference in case outcomes between the two divergent approaches is vast. Diametrically conflicting results obtain, depending upon which legal test the particular court chooses to apply. A comparison between the instant case and the Second Circuit's *Hendrickson* decision illustrates the startling disparity.

In the present case, the *en banc* Tenth Circuit affirmed a District Court decision which conflicts directly in analysis and result with *Hendrickson.* Each case alleged a continuing conspiracy to rig bids on highway construction projects in violation of Sherman Act Section 1, 15 U.S.C. sec. 1, as amended (1982). Each involved effectuation of the bidrigging scheme through submission of complementary (or accommodation) bids intended to give a deceptive appearance of competition, and the filing of false noncollusion affidavits designed to allay suspicion.

Yet, applying the "affirmative acts of concealment" test, the District Court in the case at hand refused to toll the statute of limitations and dismissed the State's case on summary judgment. Following the "inherent self-concealment" approach, the Second Circuit in *Hendrickson* upheld both the tolling of the statute and a jury verdict resulting in a treble damage judgment for the State of New York in excess of $7.4 million. *Compare* App. 49-53

with 840 F.2d at 1083-85. Neither sound considerations of antitrust policy nor equity justify such disparate results.

B. The District Of Colorado Is Internally Divided And The Decisions Of Other Federal District Courts Are In Direct Conflict.

The division within the District Court here (*i.e.*, the United States District Court for the District of Colorado) exemplifies in microcosm the conflict and confusion besetting the federal district courts in attempting to deal with the tolling of the statute of limitations pursuant to the fraudulent concealment doctrine. During 1984 the State filed in the District Court six different highway bid-rigging antitrust treble damage actions which resulted in significant litigation. Three of those suits were assigned to the senior judge in the instant case, Hon. Alfred A. Arraj. The other three cases were signed to another judge of the same court, Hon. Zita L. Weinshienk.

In all three cases before him, Senior Judge Arraj rejected the "inherent self-concealment" approach to tolling the statute of limitations under the doctrine of fraudulent concealment. He adopted instead, as the exclusive standard, the "affirmative acts of concealment" test. In each of the three suits Senior Judge Arraj then granted either full or partial summary judgment for defendants on the fraudulent concealment question, holding that the statute of limitations had run as to all projects let more than four years before suit was filed.[15] *See, e.g.*, App. 46-53.

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[15]Senior Judge Arraj was of the opinion that the antitrust offense was complete, a cause of action accrued and the statute of limitations began to run at the time rigged bids were sub-

(Continued on following page)

Conversely, in the three cases before her, Judge Weinshienk was of the view that fraudulent concealment tolling the statute of limitations could be established under the "inherently self-concealing" wrong theory as well as by means of "affirmative acts of concealment." Consequently, she granted partial summary judgment for the State in all three cases, ruling that the statute was tolled. *See Colorado ex rel. Woodard v. Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) para. 67,473 at p. 59,984 (D. Colo. 1987). Perhaps most significantly, Judge Weinshienk did not find any requirement that a concealing act need be undertaken *separate and apart* from the underlying wrong itself. *See id.*

In the same fashion, federal district courts throughout the country are divided in their interpretation and application of the fraudulent concealment exception to the statute of limitations. One line of district court cases holds, as did Senior Judge Arraj in the instant case, that "affirmative acts of concealment" are necessary to toll the statute of limitations under the fraudulent concealment doctrine in antitrust bidrigging cases. *See Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp.

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mitted to the State on a highway construction project. *See, e.g., Colorado ex rel. Woodard v. Goodell Bros., Inc.*, 1986-2 Trade Cas. (CCH) para. 67,236 at pp. 61,196-97 (D. Colo. 1986). At least five different federal appellate courts, including the Tenth Circuit, have explicitly rejected such interpretation in a highway bidrigging context. *See United States v. Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988); *United States v. Northern Improvement Co.*, 814 F.2d 540, 543-44 & n. 2 (8th Cir. 1987), *cert. denied*, — U.S. — , 108 S. Ct. 141-42 (1987); *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 245 (4th Cir. 1986); *United States v. Girard*, 744 F.2d 1170, 1173-74 (5th Cir. 1984); *United States v. Inryco*, 642 F.2d 290, 294 (9th Cir. 1981).

885, 888 (M.D. Pa. 1985) (holding that concealing acts are necessary and must be *independent* of underlying violation); *In re Fertilizer Antitrust Litigation,* 1979-2 Trade Cases (CCH) para. 62,894 (E.D. Wash. 1979) (judgment for defendant under "affirmative acts" test in antitrust bidrigging action).

In directly conflicting fashion, other federal district court decisions rule that "inherently self-concealing" wrongs suffice to meet the fraudulent concealment exception and toll the statute of limitations in antitrust bidrigging actions. *See Associated Electric Cooperative v. Sachs Electric Co.,* 1987-1 Trade Cas. (CCH) para. 67,567 (W.D. Mo. 1987); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.,* 641 F.Supp. at 274-75; *F. Buddie Contracting, Inc. v. Seawright,* 595 F.Supp. 422 (N.D. Ohio 1984).

The foregoing split of authority, carrying all the way through to the district court level, should be rectified by this Court before the case law becomes further confused.

C. The Policy Rationale Behind The Fraudulent Concealment Doctrine Mandates One Uniform Appoarch.

Logically, many federal appellate and trial courts have expressly recognized that acts undertaken *in carrying out* a violation may constitute affirmative concealing conduct sufficient to toll the statute of limitations under the fraudulent concealment doctrine.[16] In effect, holding

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[16]*See, e.g., Pinney Dock & Transport Co. v. Penn Central Corp.,* 838 F.2d at 1473-77 (affirmative acts supporting fraudulent concealment may consist of acts in furtherance of violation); *Hobson v. Wilson,* 737 F.2d at 36-37, 41 (affirmative acts of concealment occurred in course of perpetrating offense); *Greenhaw v. Lubbock County Beverage Assoc.,* 721 F.2d at 1030 (evidence indicating concealment consisted of some of evidence establish-

(Continued on following page)

that affirmative concealing conduct may be comprised of acts *implementing* and *effectuating* a conspiracy amounts to a recognition that the conspiracy is self-concealing in such instance. *See, e.g., Long v. Abbott Mortgage Corp.*, 459 F.Supp. 108, 120 (D. Conn. 1978). Leading antitrust commentators support the view that such "inherently self-concealing" misconduct, as well as "affirmative acts of concealment," may serve to toll the statute of limitations under the fraudulent concealment exception. *See, e.g.*, II P. Areeda and D. Turner, *Antitrust Law* sec. 325 at 124 (1978).

Sound reasoning bolsters such conclusion. The policy which underlies the fraudulent concealment doctrine is that an injured plaintiff should have some realistic opportunity to litigate its claims which have not previously been discovered due to the defendant's conduct. In other words, the equitable policy on which the fraudulent concealment doctrine is based outweighs the policy behind the statute of limitations (*i.e.*, that of allowing defendants to repose simply due to the passage of time). *See F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. at 428.

(Continued from previous page)

ing offense); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1302 & n. 12 (5th Cir. 1983) (some of evidence establishing violation also served to conceal it); *Colorado ex rel. Woodard v. Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) para. 67,473 at p. 59,984 (D. Colo. 1987) (concealing conduct need not be separate and apart from underlying wrong); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. at 272-73 (six of seven separate bases for fraudulent concealment overlapped with factual basis for offense itself); *Nebraska v. Land Paving Co.*, 1986-1 Trade Cas. (CCH) para. 67,106 at p. 62,692 (D. Neb. Nov. 25, 1985) (affirmative acts need not be independent of wrongdoing); *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. at 425-26, 427 (fraudulent concealment consisted not of post-offense affirmative conduct but of participation in secret violation itself).

In the foregoing regard, it makes no difference whether there exist affirmative acts of concealment which are independent of the underlying wrong or whether the concealing acts are part of the violation. In either event, a plaintiff's ability to discover its cause of action and file suit on its claims within the statutory period is equally prejudiced. *See id.* at 428-29. Thus, there is no basis for distinguishing the two situations for statute limitations tolling purposes. *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. at 274. Simply put, the wrongdoing defendant should not be rewarded and the innocent plaintiff victimized. *See* App. 39-40 (Anderson, J. concurring). Consequently, this Court should grant certiorari in order to emphasize the proper focus in this area.

III. THE DECISION IN THE CASE AT HAND APPEARS DIRECTLY TO CONTRAVENE PRIOR SUPREME COURT PRECEDENT.

A. The Instant Case, Involving The Per Se Antitrust Violation Of Bidrigging, Is Not Distinguishable From Prior Supreme Court Decisions.

The District Court here categorized the Supreme Court's prior decisions in *Bailey and Holmberg* as "fraud" cases which are inapplicable in an antitrust context. App. 46, 48 & n. 2. Simply put, that is a mischaracterization. The prior Supreme Court decisions in the fraudulent concealment area involved violations of federal statutes rather than common-law fraud. Nevertheless, this Court applied the fraudulent concealment doctrine uniformly, regardless whether it was invoked in a federal

bankruptcy,[17] land patent[18] or farm loan[19] statutory context.

The case at hand is completely in line with those prior Supreme Court decisions. Here, as there, a federal statutory violation is alleged (of Section 1 of the Sherman Act, 15 U.S.C. sec. 1, as amended (1982)). Moreover, the very essence of the *per se* violation of bidrigging involved here is fraud in any event. *See United States v. Washita Construction Co.*, 789 F.2d 809, 818 (10th Cir. 1986). Thus, the distinction asserted by the District Court has no basis in reality.

B. "Passive" As Well As "Active" Concealment Serves To Toll The Running Of The Statute Of Limitations.

Additionally, the District Court here concluded that "active" rather than "passive" concealment is necessary to toll the statute of limitations pursuant to the doctrine of fraudulent concealment. App. 51. Yet, this Court's decision in *Exploration Co. v. United States*, 247 U.S. 435 (1918), upheld the tolling of the statute of limitations where mere "passive," but not "active," concealment was involved.

Similar to Western Paving's participation in a bidrigging conspiracy to violate the Sherman Act, the *Exploration Co.* defendants participated in a conspiracy to violate a federal land patent statute. As in the instant situation, the conspirators there submitted false affidavits to the government. *See* 247 U.S. at 438.

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[17] *Bailey v. Glover*, 88 U.S. (21 Wall.) at 343; *Rosenthal v. Walker*, 111 U.S. 185, 187 (1884).

[18] *Exploration Co. v. United States*, 247 U.S. 435, 436 (1918).

[19] *Holmberg v. Armbrecht*, 327 U.S. at 393.

On these facts, the Supreme Court affirmed the trial court's tolling of the statute of limitations. Such action was premised on the finding that the conspirators had engaged in "passive" concealment through "enjoining silence"—not disclosing the conspiracy's existence until after the statute of limitations had expired. *Id.* That is the very same conduct which the District Court found insufficient to toll the statute here. *See* App. 49-51.

C. There Is No Requirement That Concealing Conduct Be Separate From The Underlying Violation.

Further, the District Court concluded that the affirmative acts needed to establish fraudulent concealment cannot be comprised of the original wrongdoing itself but must be *in addition* to the underlying violation. App. 51-52. However, such holding directly conflicts with prior decisions of this Court where the concealing conduct sufficient to toll the statute of limitations consisted of the illegal activity itself.[20]

D. The Fraudulent Concealment Doctrine Is To Be Read Into, Not Out Of, Federal Statutes Of Limitation.

Finally, the decision of the District Court here would have the effect of imposing an absolute statute of limitations—*i.e.*, one without a fraudulent concealment exception. This would be true at least with respect to "inherently self-concealing" *per se* antitrust violations such as bidrigging and price fixing. In other words, the doctrine

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[20]*See Bailey*, 88 U.S. (21 Wall.) at 342-44 (conspiracy to violate bankruptcy laws); *Rosenthal v. Walker*, 111 U.S. at 186-87 (fraudulent transfer to violate bankruptcy laws); *Exploration Co. v. United States*, 247 U.S. at 435-38 ("self-concealing" conspiracy to violate land patent statute); *Holmberg*, 327 U.S. at 393 (concealment of stock ownership to violate farm loan statute).

of fraudulent concealment would be *read out of* the antitrust statute of limitations in such situations. Such a result would violate the clear teaching of this Court in *Holmberg* that the doctrine of fraudulent concealment is to be read *into every* federal statute of limitations. 327 U.S. at 397.

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CONCLUSION

Despite its importance, particularly in the antitrust area, the doctrine of fraudulent concealment has received little attention from the Supreme Court. The few older cases in the area do not carefully explain how the doctrine should be applied, and the Court has provided little meaningful guidance on the subject either before or after the most recent of those decisions was rendered some 42 years ago.

In this vacuum, the lower federal courts have been left to themselves to decide fraudulent concealment cases. Unfortunately, they have often been unable to discern proper standards for application of the doctrine. Thus they do not always carefully analyze the rules governing application of the doctrine and frequently state conclusions without explaining them in any great depth. Given this ad hoc approach, haphazard results have been almost inevitable.

The current and growing disarray in the law of fraudulent concealment has resulted in large measure from lack of direction from this Court. Given the importance of federal claims in general, and federal antitrust claims in particular, such inattention has resulted in critical con-

fusion.[21] The consequence of that confusion has been to severely impugn the fundamental national economic policy of competition embodied in the antitrust laws.

In view of all of the preceding, the Court should grant certiorari in this case to clarify the law of fraudulent concealment, particularly as it applies in the antitrust context.

Respectfully submitted,

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[21] *See generally* Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L.J. 829, 833-36 (1983).

APPENDIX

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodward,	)	
Plaintiff-Appellant and Cross-Appellee,	)	Nos. 86-1363 86-1420
v.	)	
WESTERN PAVING CONSTRUCTION CO.,	)	(Filed March 10, 1988)
Defendant-Appellee and Cross-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D.C. Civil Action No. 84-A-1483)

David S. Harmon, Assistant Attorney General, Antitrust Section (Thomas P. McMahon, First Assistant Attorney General, Chief, Antitrust Section; Duane Woodward, Attorney General; Charles B. Howe, Deputy Attorney General; and Richard H. Forman, Solicitor General, with him on the briefs), for Plaintiff-Appellant

John Bodner, Jr., Howrey & Simon, Washington, D.C. (Marcia Press Kaplan of Howrey & Simon, Washington, D.C., and B. Lawrence Theis of Walters & Theis, Denver, Colorado, with him on the brief), for Defendant-Appellee

Robert A. Butterworth, Attorney General of the State of Florida, and Jerome W. Hoffman, Assistant Attorney General of the State of Florida, filed a brief *Amicus Curiae* for the State of Florida

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA and BALDOCK, Circuit Judges

PER CURIAM

The prior judgment of this Court is vacated and the panel opinion of this Court, 833 F.2d 867 (1987), is withdrawn. The judgment of the District Court is affirmed by an equally divided Court.

JANUARY TERM—JANUARY 29, 1988

Before Hon. William J. Holloway, Jr., Chief Judge, Hon. Monroe G. McKay, Hon. James K. Logan, Hon. Stephanie K. Seymour, Hon. John P. Moore, Hon. Stephen H. Anderson, Hon. Deanell R. Tacha, and Hon. Bobby R. Baldock, Circuit Judges, United States Court of Appeals.

STATE OF COLORADO, ex rel. COLORADO ATTORNEY GENERAL, DUANE WOODWARD,	)	
Plaintiff/Appellant and Cross-Appellee,	)	
v.	)	Nos. 86-1363 86-1420
WESTERN PAVING CONSTRUCTION CO.,	)	
Defendant/Appellee and Cross-Appellant.	)	

The Court, sitting en banc, will hear oral argument in the captioned appeals on Thursday, March 3, 1988, at 2:00 p.m. The issues to be argued are those raised both in the

briefs on appeal and in the petitions for rehearing with respect to the correct interpretation and application of the fraudulent concealment doctrine of tolling, inclusive of questions relating to affirmative acts of concealment and self-concealing fraud. Those issues shall include argument with respect to the extent, if any, that this Court's opinion in *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), applies to or governs the issues in the captioned appeals, and, if it applies, whether that case should be followed, modified or overruled. Additionally, the parties shall address the issue of the clear and convincing evidence standard imposed in the majority opinion in these appeals.

The Court will take into account the briefs already filed by the parties in the appeals. The parties are not required to file additional briefs. However, they are permitted to file simultaneous supplemental briefs, not in excess of 30 pages, on the issues referred to herein, no later than Friday, February 19, 1988.

/s/ Robert L. Hoecker
Robert L. Hoecker
Clerk

NOVEMBER TERM—December 31, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodward,	)	
Plaintiff-Appellant, Cross-Appellee,	)	
v.	)	Nos. 86-1363 and 86-1420
WESTERN PAVING CONSTRUCTION CO.,	)	
Defendant-Appellee, Cross-Appellant.	)	

The petitions for rehearing are granted and the suggestions for rehearing en banc are accepted. Argument before the court *en banc* shall be heard at the March Term of Court, February 29, 1988 to March 4, 1988. The parties will be advised of the date and time of argument.

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Chief Deputy Clerk

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodward,	)	
Plaintiff-Appellant and Cross-Appellee,	)	Nos. 86-1363 86-1420
v.	)	
WESTERN PAVING CONSTRUCTION CO.,	)	(Filed Nov. 16, 1987)
Defendant-Appellee and Cross-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D.C. Civil Action No. 84-A-1483)

David S. Harmon, Assistant Attorney General, Antitrust Section (Thomas P. McMahon, First Assistant Attorney General, Chief, Antitrust Section; Duane Woodard, Attorney General; Charles B. Howe, Deputy Attorney General; and Richard H. Forman, Solicitor General, with him on the briefs), for Plaintiff-Appellant.

John Bodner, Jr., Howrey & Simon, Washington, D.C. (Marcia Press Kaplan of Howrey & Simon, Washington, D.C., and B. Lawrence Theis of Walters & Theis, Denver, Colorado, with him on the brief), for Defendant-Appellee.

Before McKAY, SEYMOUR and ANDERSON, Circuit Judges.

McKAY, Circuit Judge.

On July 19, 1984, plaintiff, State of Colorado, filed a private antitrust claim under section one of the Sherman

Antitrust Act, 15 U.S.C. § 1 (1982), against defendant, Western Paving Construction Company. Plaintiff accuses defendant of engaging in a conspiracy to rig bids on Colorado highway construction projects from "as early as January of 1971" and extending "at least to some time in 1978." Amended Complaint, record, vol. 1, doc. 2, at 3. Because plaintiff did not allege that its cause of action arose on or after July 20, 1980, the "critical date" for purposes of the antitrust statute of limitation, 15 U.S.C. § 15b (1982), it claimed that the statute should be tolled because defendant fraudulently concealed the alleged violations.

After both parties conducted discovery on the fraudulent concealment issue, defendant filed two motions. First, it filed a motion for summary judgment, claiming that plaintiff had not shown fraudulent concealment and, therefore, the action should be dismissed under the statute of limitations. Second, defendant filed a motion to dismiss and to grant attorney's fees under Fed. R. Civ. P. 11, contending that plaintiff's action was frivolous and that its investigation was inadequate. Plaintiff responded by filing a motion for partial summary judgment on the statute of limitations issue.

The district court granted defendant's motion for summary judgment, finding that plaintiff had not shown affirmative acts of concealment and that a self-concealing conspiracy alone would not toll the antitrust statute of limitations. The court also denied defendant's motion for attorney's fees, finding plaintiff's action was not frivolous and its investigation was adequate.

Plaintiff appeals, arguing that it has shown either that defendant engaged in a self-concealing conspiracy or

that defendant or its coconspirators committed affirmative acts of concealment. Either of these propositions, plaintiff claims, entitles plaintiff to toll the statute of limitations under the fraudulent concealment doctrine. Defendant cross-appeals, claiming that the district court erred in refusing to grant it attorney's fees.

I. Background

Plaintiff's most reliable evidence of fraudulent concealment arises from events surrounding three specific construction projects: (1) the 1971 Newcastle-Easterly project; (2) the 1972 Lamar-East project; and (3) the 1974 Parker Road project. Evidence on these events is derived from the deposition testimony of Larry Wallace Corn and Donald G. Popejoy.

Mr. Corn, an employee of one of defendant's alleged coconspirators, testified extensively on his involvement in bidrigging on the Newcastle project. Prior to giving any testimony, Mr. Corn entered a settlement agreement with plaintiff concerning his and his employer's bidrigging activities in Colorado. As a part of that agreement, Mr. Corn agreed to fully cooperate in plaintiff's efforts to investigate and prosecute other alleged bidriggers. While Mr. Corn admitted participation in thirteen bidrigging schemes, the Newcastle project is the only project in which he mentions defendant as one of the conspirators.

Mr. Corn organized the bidrigging on the Newcastle project. To carry out his scheme, he first consulted the plan holders list published by plaintiff and asked the state engineer which contractors had actually looked at the project. He then compiled a list of potential bidders, their telephone numbers and, in those cases in which he knew,

the party to contact. Once the list was completed, Mr. Corn began contacting the potential bidders.

In making his contacts, Mr. Corn started with the bidders he felt would be the most serious competitors. Once these companies had agreed to cooperate, he continued down his list until he had contacted all potential bidders. While defendant was allegedly on Mr. Corn's list, it was not one of the serious competitors.

Mr. Corn testified that he made most contacts by telephone from a hotel room in Denver in which he stayed during the bidletting on the Newcastle project. Mr. Corn testified that when he called a potential bidder, he first obtained a commitment to participate in the bidrigging scheme and then revealed the approximate amount of Corn Construction's bid on the project. After Mr. Corn obtained a commitment to participate in the scheme, he added the name of the person with whom he spoke to his list of bidders.

Mr. Corn had difficulty remembering the details of these contacts. When asked about details of the conversations, he replied:

> There isn't any way I can sit here today and tell you exactly what I told those people thirteen, fourteen years ago. I can tell you I got the job rigged and I talked to these people and gave them our bid or very close to that figure so they would have an idea of where to bid.

Deposition of Larry Wallace Corn, record, vol. 2, at 46. Mr. Corn also had difficulty remembering which parties he had actually contacted and how many times he may have called particular persons. However, he maintained

that each party he contacted agreed to participate in the bidrigging scheme and agreed to submit a complementary bid.

After all contacts were made, Mr. Corn was ready to attend the bidletting ceremony. Just prior to attending, or immediately after the ceremony, Mr. Corn destroyed his list of potential bidders. He testified that this was done to avoid discovery of the list and to cover up the bidrigging scheme. At the bidletting ceremony, Corn Construction, Mr. Corn's employer, was the successful bidder. As was required by plaintiff, Mr. Corn executed an affidavit stating that neither he nor Corn Construction had colluded in arriving at the bid amount. Mr. Corn testified that he executed this affidavit even though he knew it was false.

Mr. Corn remembered specific contacts with defendant. He testified that he initially called Alvin Walters and asked "if they would allow us to be the successful bidder on the job and he told me that I'd have to talk to Harold Stillman." *Id.* at 22. At the time, Mr. Stillman was responsible for all defendant's bids on projects outside the Denver metropolitan area. Mr. Walters denied any conversation with Mr. Corn.

Mr. Corn claimed that he spoke to Mr. Stillman, who agreed to cooperate and to submit a complementary bid. Specifically, Mr. Corn testified that he gave Corn Construction's bid amount to Mr. Stillman, *id.* at 47, and that he called Mr. Stillman from his hotel room. *Id.* at 55. When asked about a specific recollection of the conversation, Mr. Corn stated:

> I can tell you the gist of it. I told him we were interested on the job in New Castle, we were set up in

> the pit and we were wondering if they'd go along with us. I can't remember what his immediate reply was. The end result was that they said they would, but we owed them a job.

Id. at 63. On cross-examination, Mr. Corn reiterated:

> I just asked him if he would go along with us on it and that we were interested in the job, that we were set up there and would be willing to give him a future job. And he agreed and just said that we owed him one or something to that effect.
>
> . . . .
>
> I knew after I talked to him that he was willing to go along with us and we owed him a future job. I don't remember exactly how that was arrived at.

Id. at 117. Despite this testimony, Mr. Corn admitted that defendant never received a complementary bid from Corn Construction. He testified that Newcastle is the only project about which he talked to defendant.

Defendant did not present any testimony to counter Mr. Corn's testimony as to conversations with Mr. Stillman because none is available. Mr. Stillman died long before plaintiff filed this suit; thus, he was never able to give his testimony concerning the events surrounding the Newcastle project. Defendant's other employees denied any knowledge of a bidrigging scheme, and Mr. Corn admitted that he has no evidence that Mr. Stillman revealed the scheme to any other employee.

Plaintiff does have a bid tabulation showing that defendant submitted a bid on the Newcastle project. However, there is no other evidence to prove or disprove Mr. Corn's testimony. With the exception of the bid tabulation, both defendant and plaintiff have destroyed all docu-

ments relating to the Newcastle project, and Mr. Stillman's testimony is unavailable. Thus, the district court had the testimony of only one man to determine whether defendant actually participated in any scheme to rig the bid on the Newcastle project.

Plaintiff contends, however, that Mr. Corn's testimony was supported by Mr. Popejoy's deposition testimony concerning the Lamar and Parker Road projects. Mr. Popejoy is an employee of Popejoy Construction Company, Inc., another of defendant's alleged coconspirators. Like Mr. Corn and Corn Construction, Mr. Popejoy and his employer entered a settlement agreement with plaintiff and federal authorities. The agreements cover all antitrust activities by Mr. Popejoy and Popejoy Construction, and as a portion of the agreements, Mr. Popejoy agreed to fully cooperate with plaintiff in its investigation and prosecution of other alleged bidriggers.

Mr. Popejoy testified that prior to the bidletting on the Lamar project, he contacted a number of potential bidders. He wished to determine whether the bidder was "intersted" in the project. One Colorado construction company had told Mr. Popejoy that if a company said it was "interested" in the project, the company was bidding below the engineer's estimate. On the other hand, if the company said it was "not interested," it was bidding above the estimate. While Mr. Popejoy understood the meanings attached to "interested" and "not interested," he did not actually know how many, if any, of the other companies actually attached that particular meaning to their statements.

Mr. Popejoy testified that when he made the calls on the Lamar project, none of the bidders said it was in-

terested. As a result, Mr. Popejoy submitted the bid he had prepared prior to making the contacts. He testified that if one or more potential bidder had expressed interest in the project, his bid would probably have been lower, but not more than $5,000. Mr. Popejoy also said that although he now realizes the calls probably violated antitrust laws, when he made them he did not realize he was committing antitrust violations. Rather, he thought he was testing the market for interest in the project. As was the practice, after Popejoy Construction won the bid on the Lamar project, Mr. Popejoy executed a noncollusion affidavit. Mr. Popejoy did not knowingly execute a false affidavit, however, because he did not know his telephone calls amounted to collusion.

Mr. Popejoy's contacts with defendant were made through Mr. Walters. Mr. Popejoy said that he asked Mr. Walters if defendant was interested in bidding on the Lamar project, and Mr. Walters replied that it was not. Mr. Popejoy then remembered that Mr. Walters asked what Mr. Popejoy was going to do about Domenic Leone, another bidder on the project. Mr. Popejoy responded that he was going to take his chances and recalled that Mr. Walters replied, "That's a very interesting approach." Mr. Walters' version of the conversation was different. He admitted that he spoke with Mr. Popejoy but testified that he simply told Mr. Popejoy that defendant was not interested in the project and, in fact, stated that defendant was getting out of the business of bidding projects outside the Denver metropolitan area.

As with the Newcastle project, plaintiff does have a bid tabulation showing defendant bid on the Lamar proj-

ect, but all other documents related to the project have been destroyed in the normal course of business. Furthermore, neither Mr. Popejoy's nor Mr. Walters' testimony can be corroborated because all other employees of defendant deny knowledge of any bidrigging activities, and Mr. Popejoy admitted that he spoke to no one about the call to defendant. Mr. Popejoy, however, admitted that this is the only contact he ever had with defendant and that, while some other companies asked Popejoy Construction to submit a complementary bid on some other project, defendant never requested any quid pro quo for its allegedly complementary bid on the Lamar project.

Mr. Popejoy also indirectly implicated defendant in bidrigging on the Parker Road project. He testified that while he was in Denver to bid on that project, he was approached by an employee of Peter Kiewit, another of defendant's alleged coconspirators, and asked to raise Popejoy Construction's bid on the project. Mr. Popejoy initially refused to raise the bid, but when he was promised a $10,000 payment in return for the increase, he agreed to change the bid. Mr. Popejoy had no actual knowledge of any contact between defendant and Peter Kiewit but claimed that he would not have received the $10,000 unless all bidders had been contacted and had agreed to go along with the bidrigging scheme. Again, a bid tabulation shows defendant as a bidder on the project, but all other documentation has been destroyed. Furthermore, plaintiff presented no other evidence corroborating Mr. Popejoy's testimony.

II. Tolling the Statute of Limitations

The antitrust statute of limitations states: "Any action to enforce any cause of action under [antitrust stat-

utes] shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (1982). While this statute seems to allow only a four-year period in which to bring an antitrust claim, every circuit court that has decided the issue allows tolling of the statute under the fraudulent concealment doctrine. *See Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir. 1974); *General Elec. Co. v. City of San Antonio*, 334 F.2d 480, 484-85 (5th Cir. 1964); *Westinghouse Elec. Corp. v. City of Burlington*, 326 F.2d 691, 692 (D.C. Cir. 1964) (per curiam); *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575, 576 (9th Cir. 1964); *Allis-Chalmers Mfg. Co. v. Commonwealth Edison Co.*, 315 F.2d 558 (7th Cir. 1963); *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306 (10th Cir.), *cert. denied*, 374 U.S. 809 (1963); *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), 373 U.S. 914 (1963); *see also Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984) (discusses fraudulent concealment without deciding whether it should or should not apply), *cert. denied*, 470 U.S. 1056 (1985). Plaintiff argues its claim falls within this exception to the statute of limitations. To understand application of fraudulent concealment to plaintiff's case, we first review the policies behind statutes of limitations and the fraudulent concealment doctrine.

A. Statutes of Limitations Policies

"Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and

approved in all systems of enlightened jurisprudence." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). They reflect a balancing of "the interests in favor of protecting valid claims" and "the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). Plaintiffs with valid claims have a right to recover; however, the passage of time may make it more difficult to distinguish between valid and invalid claims.

> Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the factfinding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Board of Regents of the Univ. of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980). Statutes of limitations serve that purpose. They cut off a plaintiff's right to pursue a claim and thereby avoid trial of stale claims.

Statutes of limitations assist the courts by making the adjudication process more efficient. This process is otherwise "hampered by stale evidence and absent witnesses." *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981).

> Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh.

Tomanio, 446 U.S. at 487. Thus, if statutes of limitations cut off stale claims, courts are left to try cases with more reliable evidence, thereby producing more reliable results. In addition, disallowing stale claims permits courts to try more cases because stale claims take longer to try. Witnesses with faded memories usually take longer to examine. When direct evidence has been lost or destroyed, litigants must use circumstantial evidence to prove the same points, and circumstantial evidence usually takes longer to present. Statutes of limitations thus allow courts to avoid these problems.

Statutes of limitations also benefit defendants in at least two important ways. First, they protect defendants against invalid claims. "[F]alse or fraudulent claims . . . might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable." *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975). By limiting the period during which a plaintiff is allowed to file a claim, the legislature reduces the risk that a defendant will be required to defend against a false claim. Second,

> entirely apart from the merits of particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time. It is this interest in finality which underlies the description of a limitations act as a "statute of repose."

Id. Once the statutory period has passed, a party can be certain that it will no longer be required to answer on the merits a contingent liability. The mere passage of time operates to cut off all claims. Thus, after a period of

time, a party can carry on its affairs with no need to worry about contingent liabilities.

> Statutes of limitations are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979). Because of their mechanical application, "statutes of limitation result in hardship to plaintiffs in some cases." *Steele v. United States,* 599 F.2d 823, 828 (7th Cir. 1979). However, "alleviation of that hardship is a matter of policy for the Congress." *Kaltreider Const., Inc. v. United States,* 303 F.2d 366, 368-69 (3d Cir.), *cert. denied,* 371 U.S. 877 (1962). Once Congress, or some state legislative body, has determined what is a sufficient period for bringing a claim, the courts should refuse to hear the claim after that time has passed. "Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *Davco Corp.,* 523 F.2d at 394. Plaintiffs should not be allowed to argue that no logical reason exists for applying the statute to their case. After all,

> [s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has

> been lost. *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They present a public policy about the privilege to litigate.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (footnote omitted). Legislatures enact a statute of limitations to apply to all cases covered by the statute. As the legislature is the one to make such policy decisions, the only decision for the courts is whether the claim is within the coverage of the statute.

B. Fraudulent Concealment

Although "[s]tatutes of limitations are vital to the welfare of society," *Wood,* 101 U.S. at 139, "most courts and legislatures have recognized that there are factual circumstances which justify an exception to these strong policies of repose." *Tomanio,* 446 U.S. at 487. Legislatures create some exceptions by enacting tolling provisions. In addition, a court that faces a factual circumstance that makes application of a statute of limitations particularly harsh may develop a tolling doctrine to ameliorate the harshness. One judicially created tolling doctrine is fraudulent concealment.

In explaining the basis for tolling under a fraudulent concealment claim, the Supreme Court stated:

> [Statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evi-

> dence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1875). The Court went on to hold that

> when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

Id. at 349-50. The Supreme Court, thus, adopted fraudulent concealment as a legitimate means of tolling a statute of limitations. The Court subsequently stated that this "doctrine is read into every federal statute of limitation." *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946). As a result, courts have applied fraudulent concealment to most statutes of limitations.

Despite broad use of the doctrine, courts have developed principles that limit the factual circumstances to which fraudulent concealment will apply. To maintain a fraudulent concealment claim, a plaintiff must plead and prove three elements: (1) use of fraudulent means by defendant; (2) concealment of plaintiff's cause of action; and (3) plaintiff's due diligence in attempting to uncover the claim. *See, e.g., King & King Enters. v. Champlin*

Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976). A plaintiff who fails to plead and prove all three elements will have its claim dismissed as barred by the statute of limitations.

Pleading requirements for fraudulent concealment are very strict. Some courts invoke Fed. R. Civ. P. 9(b) and require a plaintiff to meet the pleading requirements for fraud. *See, e.g., Dayco Corp.*, 523 F.2d at 394. Other courts, while not specifically invoking Rule 9, still require specificity and particularity in pleading. *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978); *Weinberger*, 498 F.2d at 555. While a pleading deficiency can be corrected by an amendment, failure to correct the problem after the amendment results in a dismissal. *See Charlotte Telecasters*, 546 F.2d at 574; *see also NL Indus., Inc. v. Gulf & W. Indus., Inc.*, 650 F. Supp. 1115, 1135 (D. Kan. 1986) (plaintiff allowed to amend but warned to "set forth facts *with particularity*"). These pleading requirements reflect the same concerns that underlie the requirement to plead fraud with particularity. Allegations of fraudulent concealment, like allegations of fraud, are harsh and may be difficult to disprove, particularly if some time has passed since the alleged concealment. Thus, in order to put the defendant on notice as to the specific allegations, courts require specific pleading. This informs the defendant of the alleged acts of concealment and allows the trial court to determine, at an early stage, whether the plaintiff has a valid concealment claim.

The pleading must set forth specific facts to prove each of the three elements of a fraudulent concealment. "[M]erely intoning the word 'fraudulently' is not sufficient to avoid the statute." *Charlotte Telecasters,* 546 F.2d at 574. Rather, "[t]he term 'fraudulent concealment' implies active misconduct." *Taylor v. Meirick,* 712 F.2d 1112, 1118 (7th Cir. 1983). Courts have alternatively stated that the defendant must engage in "some trick or contrivance," *Wood,* 101 U.S. at 143, "some misleading, deceptive or otherwise contrived action or scheme." *Hobson v. Wilson,* 737 F.2d 1, 34 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985), or "some positive misconduct." *Kriegesmann v. Barry-Wehmiller Co.,* 739 F.2d 357, 359 (8th Cir.), *cert. denied,* 469 U.S. 1036 (1984). The underlying requirement is that defendant must engage in conduct meant to conceal. The only justified reason for allowing tolling under fraudulent concealment is that the plaintiff does not know about its cause of action before the statute of limitations runs and that the defendant caused that lack of knowledge. Defendant should be subject to an extended limitation period only when it took direct action to thwart plaintiff's effort to bring a claim. Silence, without some fiduciary duty, never satisfies this fraudulent-means element. *King & King Enterps.,* 657 F.2d at 1155; *Rutledge,* 576 F.2d at 250. Denial of wrongdoing, which can be expected of all wrongdoers, is also not sufficient to toll the statute. *King & King Enterps.,* 657 F.2d at 1155; *Dayco Corp. v. Firestone Tire & Rubber Co.,* 386 F. Supp. 546, 549 (N.D. Ohio 1974), *aff'd,* 523 F.2d 389 (6th Cir. 1975); *but see Rutledge,* 576 F.2d at 250 ("denying wrongdoing may constitute fraudulent concealment where the circumstances make the plaintiff's reli-

ance upon the denial reasonable''). Plaintiff must prove that the defendant engaged in some conduct that is meant to conceal important facts from plaintiff.

Concealment of material facts, standing alone, may not be fraudulent concealment. The District of Columbia Circuit explained:

> [T]he statute of limitation is not tolled whenever a defendant has concealed facts material to *any* legal issue of significance in a case. We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage.

Hohri v. United States, 782 F.2d 227, 249 n.57 (D.C. Cir. 1986), *vacated on other grounds,* 107 S. Ct. 2246 (1987). In other words, the facts concealed must be not only material, but they must also be relevant to a ''critical element or defense attending [a] particular cause of action.'' *Id.* at 250. The crucial point is that a plaintiff should be given the opportunity to pursue a claim after the statutory limitation period has run only if it was unable to pursue the claim before the statutory period expired. If a plaintiff is led to believe that it has no cause of action or that the claim is subject to an iron-clad defense, then the concealment deprives the plaintiff of an opportunity to bring a timely action. Otherwise, plaintiff should pursue its claim before the statute runs. Only a concealment that makes it impossible for plaintiff to avoid dismissal for failure to state a claim supports a fraudulent concealment charge.

Fraudulent concealment also requires that the plaintiff be ignorant of the concealed facts. "The doctrine of equitable tolling is only available to toll the running of the statute of limitations during the period in which the potential defendants are concealing the cause of action from the potential plaintiff." *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1005 (7th Cir. 1984). Once a plaintiff actually learns the concealed facts, the statute begins to run. *See id.; cf. Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 443-44 (6th Cir. 1981) (even when plaintiff discovers cause of action within four-year limitation period, statute is tolled until the discovery and runs as soon as plaintiff discovers the concealed facts). Furthermore, the plaintiff must prove that it lacked any reason to inquire into circumstances surrounding the claim. *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1302 (9th Cir.), *cert. denied*, 107 S. Ct. 279 (1986); *Taylor*, 712 F.2d at 1118 (concealment must "frustrate[] even diligent inquiry"). When a plaintiff who has had its suspicions aroused fails to investigate, "equity will impute to [it] knowledge of facts that would have been revealed by reasonably required further investigation." *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1521 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984). Failure to investigate may result in a finding of no fraudulent concealment. *Id.; Berkson*, 743 F.2d at 56. Thus, to prove lack of knowledge plaintiff must show that it has no knowledge of the concealed facts and that it had no information that should have caused it to investigate and, in turn, uncover the claim.

In summary, a plaintiff seeking to avoid the statute of limitations by invoking fraudulent concealment must

satisfy strict requirements. It must specifically plead and prove facts supporting all three required elements and, in doing so, must show that it was impossible for the plaintiff to maintain the cause of action before the statute had run. Fraudulent concealment has a place in the law, but as an ameliorative doctrine, its application should be limited to circumstances that led to its creation—namely, when defendant's actions foreclose any chance for plaintiff to bring its claim before the statutory limitation period expires.

Despite these requirements limiting the application of the doctrine, fraudulent concealment still presents a difficult analytical problem. Proving the alleged act of concealment is subject to the same problems of staleness and potential for unjustified claims as proving the primary cause of action. In some cases, the last claimed act of concealment may occur almost simultaneously with the acts claimed to constitute the Sherman Act violation. In fact, in the case at hand proof of the claimed concealment is essentially identical to proof of the claimed antitrust violation. In those instances, faded memory and lost evidence is as likely to produce an unjust or erroneous finding of concealment as such evidence is to produce a similar finding on the merits. As a result, permitting tolling for fraudulent concealment itself undermines the policy embodied in the statute of limitations: to insure against unreasonable hazard of inaccurate results derived from

the unreliability of stale or lost evidence.[1] Therefore, courts must apply the tolling doctrine of fraudulent concealment with great care, recognizing that the tolling claim itself is fraught with potential for unjust and unwarranted establishment by stale and incomplete evidence.

C. Plaintiff State of Colorado's Fraudulent Concealment Claim

The district court held that plaintiff's claim was barred by the statute of limitations. This included a decision that plaintiff failed to present evidence to support its fraudulent concealment claim. More specifically, the district court found that plaintiff failed to present evidence showing that defendant used fraudulent means to conceal plaintiff's cause of action. The district court first required plaintiff to show affirmative acts of concealment to satisfy the fraudulent means element and then found that plaintiff presented no affirmative acts.[2] Plaintiff

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[1] Congress must have had some of these considerations in mind when it enacted the antitrust statute of limitations. In fact, questions arose in debates about the application of the statute in cases of conspiracy. The consistent reply was that in cases of fraud and conspiracy the statute would not run until the time of discovery. *See, e.g.*, 101 Cong. Rec. 5129, 5130, 5132-33 (1955); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 278-80 (8th Cir.) (analysis of the legislative history), *cert. denied*, 371 U.S. 912 (1962), 373 U.S. 914 (1963). At that time, the doctrine of fraudulent concealment was a well-recognized tolling doctrine, and thus, as noted earlier, all circuit courts decided that it should apply in antitrust cases.

[2] Because the district court found that plaintiff had not satisfied the first element of the fraudulent concealment test, it did not reach the other elements. Colorado ex rel Woodward v. Western Paving Const. Co., 630 F. Supp. 206, 211 n.5 (D. Colo. 1986). We likewise do not reach them; they are best left for an initial decision by the district court.

claims that this decision is erroneous because it showed affirmative acts and because proof of a self-concealing conspiracy can satisfy the fraudulent means element.

1. Affirmative Acts of Concealment

In the district court, plaintiff asserted the following affirmative acts: (1) Larry Corn's submission of a false non-collusion affidavit in connection with the Newcastle project; (2) Western Paving's representative falsely denying any wrongdoing during a May 1982 interview; (3) Mr. Stillman's failure to disclose existence of the conspiracy to other employees of defendant; (4) defendant's submission of a complementary bid on the Newcastle project; and (5) Mr. Corn's preparation of the competitor list and making of telephone calls from a hotel room. The district court was correct in concluding that none of these acts should be considered affirmative acts of concealment.

"A denial of an accusation of wrongdoing does not constitute fraudulent concealment." *King & King Enters.*, 657 F.2d at 1155 (quoting *King & King Enters. v. Champlin Petroleum Co.*, 446 F. Supp. 906, 912 (E.D. Okla. 1978)). A denial of wrongdoing can be expected of every wrongdoer as well as every innocent accused of wrongdoing. Thus, plaintiff should not be permitted to maintain its cause of action after the statute of limitations has run merely because defendant, or its alleged coconspirator, denied any wrongdoing. The same may be said of silence. "[I]n the absence of a fiduciary duty between the parties, mere failure to disclose the existence of a cause of action does not constitute fraudulent concealment." *Id.* (quoting *King & King Enters.*, 446 F. Supp. at 912). No

one who commits antitrust violations announces the violations to the potential plaintiffs. Thus, if silence were an affirmative act of concealment, every antitrust claim would be tolled until the plaintiff discovered what it asserts is evidence supporting its action. We refuse to adopt such a rule.

Three of the alleged affirmative acts of concealment were either a denial of wrongdoing or silence. Mr. Corn's submission of the noncollusion affidavit was no more than his denial of wrongdoing in preparing the Newcastle bid. Plaintiff's allegations state that defendant's representatives denied any wrongdoing when questioned during the 1982 interviews; even if the allegation is true, it claims nothing more than a denial of wrongdoing. Finally, Mr. Stillman's failure to disclose the existence of the conpiracy is at most silence. None of these three acts will support a fraudulent concealment claim.

The remaining acts were a part of the underlying conspiracy. If plaintiff's allegations are true and defendant and others engaged in a bidrigging conspiracy, then complementary bids were necessary. Furthermore, Mr. Corn's preparation of the competitor list would have been one step in carrying out that conspiracy. We agree with the district court that affirmative acts of concealment are "steps [taken] *in addition* to the original wrongdoing to prevent the plaintiff from discovering the wrong." *Colorado ex rel Woodard v. Western Paving Const. Co.*, 630 F. Supp. 206, 210 (D. Colo. 1986) (emphasis added). Acts that are part of the original wrong, while they may conceal the wrong, are not acts of concealment; they are acts

of perpetration. Consequently, plaintiff has shown no affirmative acts of concealment.

2. Self-Concealing Conspiracy

Plaintiff also argues that proof of a self-concealing conspiracy satisfies the fraudulent means element. The district court rejected this argument, stating:

> Plaintiff relies on *dicta* in *King & King* in which the Court discussed a Temporary Emergency Court of Appeals case in which that court stated that a defendant's conduct can sometimes be "inherently self-concealing," thus dispensing with the requirement of proof of affirmative acts of concealment. However, this *dicta* is directly contrary to the holding in *King & King* and the Court's statement that "[O]nce it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing . . . that some *affirmative act* of fraudulent concealment frustrated discovery notwithstanding [the plaintiff's] diligence."

Western Paving, 630 F. Supp. at 209 n.3 (quoting *King & King Enters.*, 657 F.2d at 1154-55). In *King & King Enterprises*, the affirmative acts of concealment—preparing a "talk/no talk" list and placing telephone calls after normal working hours—were also acts of perpetration. As Judge Anderson observes in his concurrence, the facts of *King & King Enterprises* do not require that the acts of concealment be independent of the underlying claim. Since the acts occurred contemporaneous with—rather than subsequent to—the original wrong, they could also support a self-concealing conspiracy theory. However, while requiring "some affirmative act" of concealment, the court never explicitly addressed the self-concealing argument. Thus,

although *King & King Enterprises* does not by its language mandate acceptance of a self-concealing conspiracy argument, neither does it foreclose such an argument. The matter of self-concealment described as such is one of first impression in this court.

While no circuit court has reached the issue in antitrust claims, the District of Columbia Circuit has decided that a self-concealing conspiracy could toll the statute of limitations in a civil rights action. *Hobson v. Wilson*, 737 F.2d 1, 33-34 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Two district court cases support plaintiff's claim. The court in *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422 (N.D. Ohio 1984), stated:

> [T]he reason for tolling the statute of limitations [is] the plaintiff's ignorance of its claim because of the defendant's conduct. The statute of limitations exists for the purposes of barring stale conflicts. While the statute allows the defendant to repose after the passage of time, this policy is subsidiary to the policy that the plaintiff should have some opportunity to litigate his claim.

Id. at 428 (citation omitted). The court went on to state: "A self-concealing conspiracy, therefore, is the logical equivalent of affirmative acts which conceal a potential plaintiff's claim." *Id.* at 429. The court then allowed proof of a self-concealing conspiracy to support a fraudulent concealment claim.

The court in *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. 271 (E.D. Pa. 1986), reached the same conclusion. It stated:

> [A] self-concealing conspiracy is the logical equivalent of affirmative acts which conceal a plaintiff's claim; in both instances, the plaintiff lacks the oppor-

> tunity to bring the claim because of its inability to discover it. . . . I can see no reason to distinguish between situations where a conspiracy is self-concealing and where plaintiff alleges affirmative conduct by the defendant to conceal wrongdoing.

Id. at 274. The court then allowed tolling of the statute based on a self-concealing conspiracy argument.

The Ohio district court also recognized that its interpretation of fraudulent concealment could toll the statute of limtaitions indefinitely. However, it stated that requiring the plaintiff to plead and prove the other elements of fraudulent concealment would overcome this problem. *F. Buddie Contracting*, 595 F. Supp. at 429 n.4; *but see Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885, 888 (M.D. Pa. 1985) (self-concealing conspiracy argument rejected because it would toll statute indefinitely).

None of these decisions, however, considers problems that may arise when stale evidence is used to show the self-concealing conspiracy. These problems influenced the district court's decision in this case.

> This is a classic case in which the statute of limitations should be given effect. The facts forming the basis for plaintiff's claim occurred over 13 years prior to the filing of the complaint. The State's case is based almost entirely on the testimony of one witness, Larry Corn. His testimony cannot be corroborated because the only Western Paving employee with whom he "conspired," Harold Stillman, is now deceased. Both parties admit that many, if not all, of the relevant documents, including the noncollusion affidavits, bid proposals and other documents relating to the bidding process, have been destroyed pursuant to normal record retention policies.

Western Paving, 630 F. Supp. at 210-11 (footnote omitted). Without question, acceptance of a self-concealing conspiracy argument could exacerbate the stale evidence problem by permitting proof of the conspiracy after such proof was so stale as to be completely unreliable.

On the other hand, *King & King Enterprises* demonstrates that requiring affirmative acts of concealment does not avoid the stale evidence problem. Since the affirmative acts of concealment in *King & King Enterprises* occurred during, or shortly after, the alleged price fixing activities, proof of the acts of concealment would be as stale as proof of the underlying activity. Thus, while we cannot ignore the stale evidence problem, it is not sufficient, standing alone, to preclude use of a self-concealing conspiracy to support a fraudulent concealment claim.

Stale evidence is a problem because, after the statute of limitations has run, a defendant is subject to a greater risk of being required to answer on a claim after exculpatory evidence has been lost or destroyed. At that point, defendant bears a greater risk of an erroneous decision. Ancient chancery courts faced a similar situation. They "faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. Concerned that claims would be fabricated, [they] imposed a more demanding standard of proof." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388 n.27 (1983) (citation omitted). In fact, the very purpose served by the standard of proof is

> to allocate between the litigants the risk of erroneous decision. When the standard applied is a mere preponderance of the evidence, the litigants share the risk

> of error in roughly equal proportion. If a substantial individual interest is at stake, a portion of the risk of erroneous decision-making is shifted away from the individual through application of the clear and convincing standard.

SEC v. First Fin. Group, 645 F.2d 429, 434 (5th Cir. Unit A May 1981) (citing *Addington v. Texas,* 441 U.S. 418, 423 (1979)); *see also Disner v. Westinghouse Elec. Corp.,* 726 F.2d 1106, 1111 (6th Cir. 1984) (clear-and-convincing-evidence standard "guards against risk of error"). Thus, a higher standard of proof can shift the risk of error from defendant to plaintiff and alleviate the very problem created by stale evidence.

A higher standard of proof is appropriate for proof of a self-concealing conspiracy argument. The higher standard reflects a decision that the status quo is preferable to any change, and thus the party seeking change should bear "most, though not all, the risk of erroneous decision[s]." *Colorado v. New Mexico,* 467 U.S. 310, 316 (1984). A plaintiff seeking to invoke fraudulent concealment is bringing its action after the statute of limitations has run. Acceptance of the fraudulent concealment argument will result in a tolling of the statute. Given the importance of statutes of limitations, courts should avoid tolling them except in limited situations. Increasing the burden on the party seeking to toll the statute will help to preserve the status quo. This argument is most compelling when the fraudulent concealment claim is based on a self-concealing conspiracy. Because the plaintiff rests its fraudulent concealment claim on evidence as stale and unreliable as evidence supporting the conspiracy claim, tolling the statute revives the very risk that the statute of

limitations was enacted to prevent. Thus, some mechanism is needed to shift that risk back to the plaintiff. The higher standard of proof accomplishes that purpose.

The nature of a fraudulent concealment claim also supports a higher standard of proof. In *Bailey,* the Supreme Court decided that a litigant should not be allowed to commit a fraud—conceal plaintiff's cause of action—and then make that fraud "successful and secure" by pleading a provision of the law designed to prevent fraud —statutes of limitations. *Bailey v. Glover,* 88 U.S. at 349. To avoid that anomaly, the Court adopted the fraudulent concealment tolling doctrine. The basis for the doctrine was fraud. While it has been expanded to include activities that are not within the general definition of fraud, the courts have retained some of the similarities. For instance, a party seeking to invoke fraudulent concealment must plead the facts giving rise to the claim with specificity and particularity, the same requirement as fraud pleadings. We now carry the analogy one step further. Not only do the fraud pleading requirements apply, but the fraud standard of proof—clear and convincing evidence—also applies to fraudulent concealment when the fraud is a self-concealing conspiracy.

We, therefore, conclude that plaintiff, in its attempt to escape the statute of limitations, should be permitted to base its fraudulent concealment claim on proof of a self-concealing conspiracy. However, we hold that plaintiff must prove the existence of the conspiracy, the self-concealing nature of the conspiracy and defendant's participation in the conspiracy by clear and convincing evidence. In cases involving tolling based on a self-concealing theory, the proof of the merits and the proof of tolling are

the same, and thus, in effect, the higher standard of proof applies both as to tolling and liability. In this manner plaintiff is permitted to maintain its claim but also bears most of the burden of an erroneous decision.

D. Plaintiff's Proof of Self-Concealing Conspiracy

The district court granted defendant's motion for summary judgment and denied plaintiff's motion for partial summary judgment. Plaintiff claims that the district court erred because defendant engaged in a bidrigging conspiracy, and the statute of limitations should be tolled under a fraudulent concealment analysis. The only element of fraudulent concealment at issue in this case is whether defendant used fraudulent means to conceal plaintiff's cause of action. To prevail, plaintiff must prove by clear and convincing evidence that a bidrigging conspiracy existed, that the bidrigging conspiracy is a self-concealing conspiracy, and that defendant participated in the conspiracy. At the summary judgment level,

> we must view the case in the same manner as did [the district court]. *See Western Casualty & Surety Co. v. National Union Fire Ins. Co.*, 677 F.2d 789, 791 n.1 (10th Cir. 1982); *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1377 (10th Cir. 1980). . . . [W]e must determine whether any genuine issue of material fact exists and, if not, whether the substantive law was correctly applied. *See* Fed. R. Civ. P. 56(c); *Western Casualty, supra.* In doing so, we must view the record . . . in the light most favorable to the party opposing the motion.

Gomez v. American Elec. Power Serv. Corp., 726 F.2d 649, 651 (10th Cir. 1984). Thus, in deciding whether plaintiff is entitled to summary judgment on the statute of lim-

itations issue, we must consider the evidence in the light most favorable to defendant. And in deciding whether defendant is entitled to summary judgment, we must consider the evidence in the light most favorable to plaintiff.

The Supreme Court also stated that in considering a summary judgment motion, we must consider the evidence "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, —, 106 S. Ct. 2505, 2513 (1986). Consequently, in determining whether a genuine issue as to a material fact exists, we must decide whether the evidence is sufficient to put the fact in issue under a clear-and-convincing-evidence standard. Defendant is entitled to summary judgment if it can show that plaintiff has not presented evidence that a jury could find, under the higher standard of proof, supports a decision that defendant engaged in a self-concealing conspiracy. On the other hand, plaintiff is entitled to summary judgment only if it shows that existence of the conspiracy is established even under a clear-and-convincing-evidence standard.

Plaintiff's proof of the existence of the conspiracy is strong. In fact, defendant does not deny that a conspiracy existed but rather denies that it was involved in any conspiracy if it did exist. Mr. Corn testified that a bid-rigging conspiracy existed on the Newcastle project and pleaded guilty to charges that he participated in that conspiracy. Even when he was unable to remember the details of the conspiracy, Mr. Corn was sure that such a conspiracy existed and that his company benefited from the bidrigging. Furthermore, Mr. Popejoy testified that he violated antitrust laws on the Lamar project. He de-

cided to call all potential bidders on the project, and after finding that none was "interested," he submitted his bid without further reducing the bid amount. Mr. Popejoy also testified that he gave a complementary bid and received $10,000 compensation for that bid on the Parker Road project. While no direct evidence linked the bidrigging on the Newcastle project with the bidrigging on the Lamar and Parker Road projects, the nature of a bidrigging conspiracy would permit the jury to find that a complementary bid on the first project may be repaid on one of the later projects. This would support a finding of a conspiracy. Even applying a clear-and-convincing-evidence standard, plaintiff has presented sufficient evidence, if believed, to show existence of a conspiracy.

We now turn to the question of whether a bidrigging conspiracy is a self-concealing conspiracy. If a bidrigging conspiracy exists, it must remain concealed to be successful. Any knowledge of the conspiracy would lead plaintiff to seek action immediately and result in collapse of the conspiracy. Furthermore, unlike many conspiracies, a bidrigging conspiracy is likely to exist for an extended period of time. To be attractive to all bidders, the conspiracy must cover more than one job—or must provide some quid pro quo to the "losing" bidders. The very nature of a bidrigging conspiracy makes it likely that future bids will also be rigged. Mr. Corn testified that he told Mr. Stillman that "we . . . would be willing to give him a future job. And he agreed and just said that we owed him one . . . . " Deposition of Larry Wallace Corn, record, vol. 2, at 117. These additional bidrigging activities not only provide the compensation for one of the "losing" bidders in the original bid but also help to conceal

the bidrigging activity on the other bids. Such subsequent fraudulent acts may in themselves amount to affirmative acts of concealment. *See Blanchette v. Cataldo,* 734 F.2d 869, 876 (1st Cir. 1984). In any event they show that a bidrigging conspiracy, if it exists at all, is *per se* self-concealing. Plaintiff has, therefore, satisfied the requirement of presenting evidence which, if believed, proves the conspiracy was self-concealing.

Proof of defendant's participation is much more troubling. Defendant's representatives explicitly denied any participation in illegal activities, and the only party with whom Mr. Corn allegedly conspired, Harold Stillman, is dead and cannot testify. Thus, the only evidence of defendant's participation in the conspiracy was Mr. Corn's testimony. Mr. Corn testified that he contacted defendant and that Mr. Stillman agreed to go along with the bidrigging scheme. But he also testified that this was the only contact he had with defendant and that defendant never asked Corn Construction to submit a complementary bid in return for defendant's bid on the Newcastle project. This evidence does not satisfy plaintiff's burden of showing that defendant participated in the bidrigging scheme as a matter of law. In a similar manner, Mr. Popejoy's testimony does not provide such clear and convincing proof of defendant's participation in a bidrigging scheme that plaintiff is entitled to summary judgment. Mr. Popejoy's allegations relating to any conversation with Mr. Walters are denied by Mr. Walters, and Mr. Popejoy admitted that defendant never asked for a complementary bid from Popejoy Construction. A jury could decide that defendant never participated in any bidrigging scheme. Thus, plaintiff is not entitled to summary judgment, and

we affirm the district court's decision denying that motion.

The more difficult question is whether defendant is entitled to summary judgment. To escape summary judgment for defendant, plaintiff must show that a genuine issue of material fact exists as to defendant's participation in a bidrigging conspiracy. Furthermore, the evidence must create that issue under a clear-and-convincing-evidence standard. Mr. Corn's testimony is reasonably clear. He specifically testified that he contacted Mr. Stillman, obtained Mr. Stillman's agreement to participate in the scheme and told Mr. Stillman Corn Construction's bid. Moreover, the bid tabulation shows that on the Newcastle project defendant did submit a bid higher than Corn Construction. In addition, Mr. Popejoy specifically recalled the conversation with Mr. Walters. While Mr. Walters denied the essence of the conversation, claiming that he told Mr. Popejoy that defendant was getting out of bidding on projects outside the Denver metropolitan area, defendant submitted a bid on the Lamar project. Submission of a bid when he claimed to be getting out of that type of project may undermine Mr. Walters' credibility.

Even under a clear-and-convincing-evidence standard a jury could infer that defendant agreed to join the conspiracy and participate in the bidrigging. Thus, we conclude that defendant has not shown at this stage that there is no genuine issue as to any material fact.

III. Attorney's Fees

Defendant appeals the district court decision denying it attorney's fees. A decision on attorney's fees will be

reversed only if the trial court abused its discretion. *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985). Given our determination on the merits that plaintiff is entitled to tolling under the fraudulent concealment doctrine if it can prove a self-concealing conspiracy, plaintiff's claim was not frivolous. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant attorney's fees.

Accordingly, we REVERSE the granting of defendant's motion for summary judgment and REMAND for proceedings consistent with this opinion.

86-1363, 86-1420—State of Colorado ex rel. Colorado Attorney General Duane Woodward v. Western Paving Construction Co.

ANDERSON, Circuit Judge, concurring.

I concur in the result in this case because as a practical matter it is required by this court's opinion in *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

I would not go so far as to adopt the self-concealing fraud concept. "Self-concealing" is too amorphous. I prefer to maintain the requirement that a plaintiff show affirmative acts of concealment, although I would allow such acts to be part of the substantive misdeed. The justification for tolling the statute of limitations when there are affirmative acts of concealment independent of the underlying cause of action applies equally to acts of concealment which are also part of the cause of action. The

defendant is not permitted to be rewarded, nor the diligent plaintiff punished, by the defendant's successful design to frustrate discovery of the wrong until the statute bars redress.

However, the extent of this creeping judicial alteration of the statute must be recognized. Since conspiracies are secret by nature, our holding moves another step closer to eliminating any time bar for an undisclosed conspiracy, leaving only questions of the plaintiff's knowledge and diligence for activating the statute. *See Hall v. E. I. DuPont DeNemours & Co.*, 312 F. Supp. 358 (E.D. N.Y. 1970). The few arguments to the contrary are unpersuasive. *See F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422, 429 n.4 (N.D. Ohio 1984). Surely Congress could have fashioned the statute to run from the time of discovery if it had so desired, and it is not likely that the statute as written was intended to be the exception to a judicial rule. Over 100 years have passed since the Supreme Court spoke the words supposedly validating the "self-concealing" fraud rule in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1875), with a significant lack of acceptance of that rule by lower courts. The fact that most courts have required independent affirmative acts of concealment,[1] when adoption of a self-concealing fraud rule would have eliminated most of their labors on the facts

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[1] *See, e.g., Rutledge v. Boston Woven Hose and Rubber Co.*, 576 F.2d 248 (9th Cir. 1978); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *City of Philadelphia v. Nucero Corp.*, No. 86-3628, slip op. (E.D. Pa. March 17, 1987) ("[m]ost courts have required a showing of an affirmative act of concealment by the defendant that is independent of the underlying wrong."); *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885 (M.D. Pa. 1985).

and disposed of or eliminated much of the litigation in this area, makes a powerful point, albeit by inference.

While ample justification exists for staying the statute in the face of defendants' calculated secrecy, it must be remembered that statutes of limitation are consciously arbitrary, and serve a social purpose by being so. All those considerations are the business of Congress, not the courts.

Adoption here of concealment in and of itself as the test for tolling, even when that concealment is coupled with intent and affirmative acts constituting a substantive wrong, still does not provide a satisfactory line of demarcation. Malefactors avoid consequences by seeking and keeping act, actor, or both secret. Such secrecy is, as it were, a "fraud" on the victim, whose recovery is stymied by an inability to know the act or discover the actor. Yet no one would venture that all statutes of limitation are or should be judicially amended to commence when the plaintiff at last discovers (after "due" diligence) that a wrong has been committed and by whom. Perhaps that is why most courts to date have adhered to the independent affirmative acts rule. That rule offers a test short of concealment in and of itself, i.e. it requires two separate wrongs: the underlying misdeed plus the further misdeed of the cover-up. That requirement of two wrongs also broadens the plaintiff's evidentiary burden when bringing an action after the statutory period, thus providing some additional protection to defendants faced with the necessity of defending a charge on stale evidence. In this case and *King and King*, the evidentiary base is narrowed to the substantive wrong. The balance is somewhat re-

stored by the clear and convincing standard imposed by the majority, and I hope that trial courts are liberal in granting dispositive motions at any appropriate stage of the proceedings where it appears that a plaintiff's case cannot fairly clear that hurdle because of the passage of time.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-A-1483

STATE OF COLORADO, ex rel.
Colorado Attorney General
Duane Woodard,

Plaintiff,

v.

WESTERN PAVING CONSTRUCTION CO.,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed March 3, 1986)

ARRAJ, District Judge

I. BACKGROUND

On July 19, 1984, the State of Colorado filed this civil antitrust action against Western Paving Construction Company ("Western Paving"), an asphalt-paving construction firm in the Denver area, alleging violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1980), and the Colorado state antitrust laws.[1]. In the Sherman Act claim, plaintiff alleges that Western Paving conspired with other road paving firms to rig bids for

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1. On September 7, 1984, I granted Western Paving's Motion to Dismiss the state antitrust count, rejecting plaintiff's claims of pendent jurisdiction.

Colorado highway construction projects. Plaintiff alleges in the complaint that the conspiracy existed "as early as January 1971" and extended "at least to sometime in 1978." Because the complaint does not allege a conspiracy within the four-year statute of limitations period, *i.e.*, 1980-1984, the complaint alleges that the statute of limitations should be tolled due to Western Paving's fradulent concealment of the conspiracy. After much discovery, including depositions, interrogatories and other extensive document discovery, Western Paving filed this Motion to Dismiss for Failure to Comply with Rule 11 and this Motion for Summary Judgment. In support of its Motion to Dismiss, Western Paving asserts that the complaint lacks any factual or legal basis and was filed without reasonable inquiry, "in flagrant disregard" of the requirements of Rule 11 of the Federal Rules of Civil Procedure. Defendant prays for attorneys' fees and costs, as provided for under Rule 11. In its Motion for Summary Judgment, which was evidently filed as an alternative to the Motion to Dismiss, Western Paving asserts that, as a matter of law, it did not conspire to rig highway project bids, at any time, and even if it had, the State has failed to establish the necessary elements of fraudulent concealment to toll the statute of limitations. In response to these motions, the State filed this Motion for Partial Summary Judgment. In is motion, the State contends that it is undisputed that Western Paving participated in a conspiracy to rig the bids on a particular highway project in 1971 (the Newcastle Easterly project) and that defendant's fraudulent concealment of the 1971 conspiracy tolls the four-year statute of limitations at least through August 1980. In support of its motion, the State has submitted the deposition testimony of Larry Corn, of Corn Construc-

tion Company. Mr. Corn testified that he contacted the president of Western Paving, Harold Stillman, and asked him to submit an inflated bid for the 1971 Newcastle Easterly job so that Corn Construction would get the job. According to Mr. Corn, Mr. Stillman agreed to submit a complementary bid.

The parties have thoroughly briefed all of the issues presented in these motions, and have submitted voluminous appendices containing affidavits, deposition transcripts and other documentation. Under these circumstances, I find that oral argument would be of no meaningful assistance. For the reasons set forth herein, plaintiff's Motion for Partial Summary Judgment is denied, defendant's Motion to Dismiss is denied and defendant's Motion for Summary Judgment is granted.

II. TOLLING OF STATUTE OF LIMITATIONS

Even if the State is able to establish that Western Paving participated in a conspiracy in 1971, the State must overcome defendant's claim that the statute of limitations bars recovery for a conspiracy which took place more than 13 years prior to the filing of the complaint. Section 4B of the Clayton Antitrust Act, 15 U.S.C. § 15b (1985 Cum. Supp.), requires that federal antitrust actions be commenced within four years of the date the cause of action accrued. 15 U.S.C. § 15b. Under this general rule, the statutory period has run on claims based on facts occurring prior to July 1980, four years prior to the filing of the complaint in this action. To overcome this defense, the State relies on the federal doctrine of equitable tolling.

The equitable tolling concept was enunciated by the Supreme Court in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342

(1874). In that case, the Court recognized two situations in which the "strict letter of general statutes of limitation" will not be followed. First, the Court stated that "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in *concealing* the facts from the other, the statute will bar relief." In the alternative, the Court stated "where the party injured by the fraud remains in ignorance of it without any fault or want of *diligence* or care on his part, the bar of the statute does not begin to run until the fraud is discovered." 88 U.S. at 348. These two concepts set forth by the Court in *Bailey* have come to be known as the "concealment" and "diligence" elements of the equitable tolling doctrine. See *Long v. Abbott Mortgage Corp.*, 459 F.Supp. 108, 113 (D.Conn. 1978). In *Bailey*, which involved a claim for common law fraud, the Court recognized that the statute of limitations would be tolled if the plaintiff established either the defendant's concealment or the plaintiff's diligence.

The courts have applied the equitable tolling doctrine differently, depending upon the circumstances and underlying facts of each case. In actions based on fraud, the courts have continued to apply the test set forth in *Bailey*, *i.e.*, tolling requires proof of either plaintiff's diligence or defendant's concealment. See *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975); *Seiffer v. Topsy's International, Inc.*, 487 F. Supp. 653 (D.Kan. 1980). However, in antitrust actions, the majority of the Circuits, including the Tenth Circuit, have developed a more stringent test for tolling the statute of limitations. To invoke the equitable tolling doctrine in the antitrust context, a plaintiff must plead and prove

three elements: (1) affirmative acts of concealment by the defendant; (2) successful concealment from the plaintiff; *and* (3) plaintiff's due diligence until discovery of the facts. See *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (Involving cause of action for alleged violations of Sherman Act); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984), *cert. denied*, 105 S.Ct. 1765 (1985) (Sherman Act); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979) (Sherman Act); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) (Sherman Act); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (Sherman and Clayton Acts); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460 (2d Cir. 1974) (Clayton Act). Fraud cases are treated differently because the original fraud is itself an act of concealment and is considered to be inherently more difficult for a plaintiff to discover. See *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) ("[T]o toll the statute there must be affirmative acts or misrepresentations . . . . If, however, plaintiff's cause of action is based on fraud, a different rule would apply. The original fraud is regarded as a 'continuing affirmative act, and mere silence of the defendant is treated as a concealment.' ") Therefore, in antitrust cases, the equitable tolling doctrine requires proof of both the concealment and diligence elements.

The concealment element requires proof that the defendant engaged in *affirmative* conduct designed to lead a reasonable person to believe that he did not have a claim for relief. See *Rutledge v. Boston Woven Hose & Rubber*

Co., 576 F.2d 248 (9th Cir. 1978). The diligence element imposes a positive duty on the plaintiff to use diligence in discovering its cause of action within the limitations period. *Dayco v. Goodyear Tire & Rubber Co., supra*, 523 F.2d at 394. Unawareness of facts or law, alone, does not justify suspending of the operation of the statute. *Long v. Abbott Mortgage Corp., supra*, 459 F.Supp. 108, 117.

The State erroneously argues in its brief that it is not required to prove affirmative acts of concealment by Western Paving to toll the statute of limitations. The State evidently contends that proof of its due diligence, alone, is sufficient. The cases cited by plaintiff in support of this argument involve underlying actions for fraud.[2] As stated earlier, courts have historically not required proof of both defendant's concealment and plaintiff's diligence in fraud cases. Therefore, these cases are inapposite to the instant antitrust action. Plaintiff also relies on a misconstrued reading of *King & King Enterprises v. Champlin Petroleum Co., supra*, 657 F.2d 1147. In *King & King*, the Tenth Circuit Court of Appeals stated:

> The party asserting the fraudulent concealment doctrine has the burden of showing (1) the use of fraudulent means by the party who raises the bar of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action.

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2. Plaintiff cites *Bailey v. Glover, supra; Holmberg v. Armbrecht, supra;* and *Ohio v. Peterson, Lowrey, Rall, Barber and Ross*, 651 F.2d 687 (10th Cir. 1981) (Securities fraud). (See Plaintiff's Reply Brief at 8.)

657 F.2d at 1154. The Court's decision to toll the statute was specifically based on a finding that "the defendant actively sought to conceal its price fixing activities." 657 F.2d at 1156. The State's assertion that *King & King* does not require proof of affirmative acts of concealment is based on *dicta* and is contrary to the holding in that case and the weight of authority in the antitrust area.[3]

With respect to affirmative acts of concealment in this case, the State has alleged, through its investigator James C. Miller, that the fraudulent concealment argument is based on the following affirmative acts: (1) Larry Corn's submission of false noncollusion affidavits in connection with the 1971 Newcastle Easterly job; and (2) Western Paving's representative falsely denying any wrongdoing during a May 1982 interview with the Colorado Department of Highways. (See Appendix to Memorandum of Defendant Western Paving Construction Company in Support of its Motion for Summary Judgment, at Exhibit 6, p. 4, and Exhibit 9, p. 118).

With regard to the noncollusion affidavits, the State alleges that Mr. Corn submitted, along with Corn Construction Co.'s bid, an affidavit stating that he had not

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3. Plaintiff relies on *dicta* in *King & King* in which the Court discussed a Temporary Emergency Court of Appeals case in which that court stated that a defendant's conduct can sometimes be "inherently self-concealing," thus dispensing with the requirement of proof of affirmative acts of concealment. However, this *dicta* is directly contrary to the holding in *King & King* and the Court's statement that "[O]nce it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing . . . that some *affirmative act* of fraudulent concealment frustrated discovery notwithstanding [the plaintiff's] diligence." 657 F.2d at 1154-1155 (Emphasis added) (Citing trial court's opinion).

been involved in collusive activities while bidding the 1971 Newcastle Easterly job. This allegation is based on the deposition testimony of Mr. Corn. (See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at Exhibit A). At the outset, the State has failed to establish that his act of Larry Corn should be imputed to Western Paving. Nevertheless, the submission of an allegedly false noncollusion affidavit is, at most, a failure to disclose or denial of wrongdoing. Such denial does not amount to an affirmative act of concealment. See *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cases (CCH) ¶ 62,894 at p. 79,179 (E.D.Wa. 1979) ("[N]on-collusion affidavits . . . amount to no more than a denial of wrongdoing, which does not constitute fraudulent concealment.") See also *Board of Education of Evanston v. Admiral Heating and Ventilation, Inc.*, 94 F.R.D. 300 (N.D. Ill. 1982). The plaintiff's other ground for asserting fraudulent concealment, the denial of wrongdoing by Alvin Walters of Western Paving, also does not amount to an affirmative act of concealment. The courts, including the Tenth Circuit, have universally held that denial of wrongdoing does not constitute fraudulent concealment. See *King & King, supra*, 657 F.2d at 1155 ("A denial of an accusation of wrongdoing does not constitute fraudulent concealment.") (Citing trial court's opinion). See also *Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F.Supp. 546 (N.D.Ohio 1974), *aff'd.* 523 F.2d 389 (6th Cir. 1975).

In its Reply Brief, the State has asserted various additional "affirmative acts of concealment" to bolster its fraudulent concealment argument. For example, plaintiff alleges that "Stillman of Western Paving did not disclose the existence of the conspiracy on the Newcastle

project to individuals inside the company who were not involved in the conspiracy." Even if this allegation were true, the Tenth Circuit has specifically stated that "mere failure to disclose the existence of a cause of action does not constitute fraudulent concealment." *King & King, supra,* 657 F.2d at 1155 (citing trial court's opinion). Plaintiff also asserts that Western Paving committed an affirmative act of concealment by submitting a complementary bid on the 1971 project which had the appearance of regularity, thereby helping to conceal the lack of true competition in the bidding process. This type of action does not constitute fraudulent concealment. See *In re Fertilizer Antitrust Litigation, supra* at p. 79,178 ("Bids that had the appearance of regularity and their submission, which allegedly inferred that the bids were complete and regular, are not affirmative acts aimed at fraudulent concealment . . . ; such acts are at best passive conduct of concealment, if not simply silence.") See also *Board of Education of Evanston v. Admiral Heating, supra.* Finally, the State asserts as an affirmative act of concealment that Mr. Corn "made a list of competitiors with their phone numbers to whom he placed telephone calls [requesting that they submit complementary bids] . . . in total privacy and did not inform anybody about them until 1983." (See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at 13). These activities are not acts of concealment, but rather are the acts taken in carrying out the conspiracy itself. Fraudulent concealment occurs when a defendant takes affirmative steps in addition to the original wrongdoing to prevent the plaintiff from discovering the wrong. *Board of Education of Evanston v. Admiral Heating, supra,* 94

F.R.D. at 302 ("All the alleged 'means and methods' of concealment were themselves the essence of each 'commission of the fraud' and *not* post-fraud cover-ups.") (Emphasis in original). See also *McConnell v. Frank Howard Allen & Co.*, 574 F.Supp. 781, 787 (N.D.Cal. 1983). In sum, the State has failed to allege any facts which constitute affirmative acts of concealment for purposes of the tolling doctrine.

This is a classic case in which the statute of limitations should be given effect. The facts forming the basis for plaintiff's claim occurred over 13 years prior to the filing of the complaint.[4] The State's case is based almost entirely on the testimony of one witness, Larry Corn. His testimony cannot be corroborated because the only Western Paving employee with whom he "conspired," Harold Stillman, is now deceased. Both parties admit that many, if not all, of the relevant documents, including the noncollusion affidavits, bid proposals and other documents relating to the bidding process, have been destroyed pursuant to normal record retention policies. As the Supreme Court observed in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879): "Statutes of limitations are vital to the welfare of society and are favored in the law."

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4. In its briefs, the State refers to the possibility that Western Paving was involved in bidrigging on a 1978 project. However, the State's investigator stated in his deposition that the State does not have any facts, knowledge or information with respect to bidridding by Western Paving on this 1978 job. (See Appendix to Memorandum of Defendant Western Paving Construction Company in Support of its Motion for Summary Judgment, Exhibit 9 at p. 140). The only conspiracy for which the State has presented factual support against Western Paving is the 1971 Newcastle Easterly job.

Moreover, "[s]tale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *Dayco Corp. v. Goodyear Tire & Rubber Co., supra,* 523 F.2d at 394.

Plaintiff has failed, as a matter of law, to establish that Western Paving has committed any affirmative acts of fraudulent concealment.[5] Therefore, plaintiff's claim under Section 1 of the Sherman Act is barred by the applicable four-year statute of limitations.

III. MOTION TO DISMISS

As an alternative to its Motion for Summary Judgment, defendant filed this Motion to Dismiss for failure to comply with Rule 11 of the Federal Rules of Civil Procedure. Under Rule 11, the signature of an attorney or party on a pleading certifies that "to the best of his knowledge, information, and belief formed after reasonable inquiry [the pleading] is well grounded in fact and is warranted by existing law." Fed.R.Civ.P. 11. Relief under Rule 11 is discretionary and requires a showing that the plaintiff's claim is not simply lacking in merit, but bordering on frivolity. *Nemeroff v. Abelson,* 469 F.Supp. 630, 640 (S.D.N.Y. 1979).

In this case, plaintiff's failure to survive a motion for summary judgment does not imply that plaintiff's claims are frivolous or brought for some ulterior purpose. The State has submitted the affidavit of its attorney,

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5. Because I find that plaintiff's fraudulent concealment argument fails on this basis (*i.e.,* insufficient proof of affirmative acts), I need not consider whether plaintiff has satisfied the due diligence requirement.

Thomas P. McMahon, which states that Mr. McMahon interviewed Larry Corn on several occasions prior to filing this law suit. In those interviews, Mr. Corn provided information concerning Western Paving's involvement in the Newcastle Easterly job. It is clear that the State made a reasonable inquiry, for purposes of Rule 11, and that this law suit is not frivolous or brought in bad faith. With the benefit of hindsight, after the completion of discovery, it is apparent that the State faced insurmountable obstacles in this case, but I am satisfied that competent counsel would have pursued this litigation with justifiable expectations of some success. See generally *Erie Conduit Corp. v. Metropolitan Asphalt Paving Assoc.*, 106 F.R.D. 451 (E.D.N.Y. 1985) (Following dismissal of action, court denied Rule 11 Motion in antitrust case involving rigged bids for road paving contracts). Under these circumstances, imposition of sanctions would go far beyond the goals of Rule 11. Therefore, defendant's request for attorneys' fees, costs and any other relief under Rule 11 is denied.

Accordingly, IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment be, and the same hereby is, DENIED;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED;

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss be, and the same hereby is, DENIED.

The Clerk is directed to prepare and enter judgment in favor of Western Paving Construction Co. and against

the State of Colorado. Each party shall bear its own costs.

DATED at Denver, Colorado this 3rd day of March, 1986.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-A-1483

STATE OF COLORADO, ex rel.
Colorado Attorney General
Duane Woodard,

Plaintiff,

v.

WESTERN PAVING CONSTRUCTION CO.,

Defendant.

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Judge Alfred A. Arraj and filed this day, it is

ORDERED that Plaintiff's Motion for Partial Summary Judgment be, and the same hereby is, DENIED; it is

FURTHER ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED; and it is

FURTHER ORDERED that Defendant's Motion to Dismiss be, and the same hereby is, DENIED.

Each party shall bear its own costs.

DATED at Denver, Colorado, this 3rd day of March, 1986.

JAMES R. MANSPEAKER, Clerk

by /s/ Stephen P. Ehrlich
STEPHEN P. EHRLICH, Chief Deputy